

DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED: January 20, 2023 10:09 AM FILING ID: 8773CA0A69B1E CASE NUMBER: 2022CV30649
<p><b>Plaintiff:</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 align="center"><b>□COURT USE ONLY□</b></p>
Attorneys Name and Address: Aaron W. Barrick, #27981 Lauren O. Patton, #50720 FOLKESTAD FAZEKAS BARRICK & PATOILE, P.C. Attorneys for Defendants Pamela Solly and Louie Miller 18 S. Wilcox Street, Suite 200 Castle Rock, CO 80104 (303) 688-3045 <a href="mailto:Barrick@ffcolorado.com">Barrick@ffcolorado.com</a> <a href="mailto:Lpatton@ffcolorado.com">Lpatton@ffcolorado.com</a>	Case Number: 2022CV30649          Div.: 5
<p align="center"><b>DEFENDANTS PAMELA SOLLY'S AND LOUIE MILLER'S ANSWER BRIEF TO PLAINTIFFS' OPENING BRIEF</b></p>	

**DEFENDANTS** Pamela Solly and Louie Miller (hereafter “Applicants”), by and through their counsel, FOLKESTAD FAZEKAS BARRICK & PATOILE, P.C, hereby respectfully submit their Answer Brief to Plaintiffs’ Opening Brief, and in support thereof, state as follows:

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## **INTRODUCTION**

1. In 2019, Pamela Solly and Louie Miller, husband and wife (“Applicants”), purchased a 35-acre property located at 8635 S. State Highway 83, Franktown, Colorado (the “Property”). The Property is located in Douglas County, Colorado, within the Agricultural One (“A-1”) zone district at the intersection of S. State Highway 83 and Lucas Avenue. The Property consists of a historic barn built in 1911 (“Barn”), a home (where Applicants reside) and an existing caretaker/workshop structure (“Caretaker Residence”).

2. The Applicants fell in love with the history behind the barn and the beautiful, natural landscape of the land and envisioned renovating the existing structures to use 6.7 acres of the Property as an event center. The Applicants did their due diligence and met with Douglas County (“County”) officials and experts to discuss the process required for the dreams they envisioned. The Applicants learned that they would need to submit a use by special review application that meet the standards of Section 21 of the Douglas County Zoning Resolution (“DCZR”), which would ultimately need to be approved by the Douglas County Board of County Commissioners (“the BOCC”). It was understood that this application would allow for a Use by Special Review that would be routinely monitored and inspected by County officials for compliance.

3. On March 3, 2021, after months of due diligence and meetings with noise experts, architects, landscapers, traffic experts and other professionals, the Applicants submitted their Use by Special Review Application (“Application”). The lengthy Application included the Applicants’ detailed Narrative, Management Plan and expert reports regarding the impact and mitigation of traffic and noise concerns. As stated in the Application, the Applicants proposed using a 6.7 acre USR permit area on the Property, which includes conversion of the use of existing buildings (the

Barn for events and the Caretaker Residence as a bride and groom suite), a new concrete pad for optional temporary event tents, and an off-street parking area. Tr. 08/09/2022, p. 4:12-17.

4. The Planning Commission evaluated and scrutinized the Applicants' request at its July 18, 2022 public hearing and recommended approval of the Application by a vote of 6-0. Tr. 08/09/2022, p. 6:1-3. After public comment, supplemental expert testimony and a hearing, the elected members of the BOCC also approved the Application by a vote of 2-1. Tr. 08/09/2022, pp. 167-168. The approval provides a Use by Special Review to the Applicants, which will be inspected for compliance at least once per year and may be revoked if the use is not in compliance with the Management Plan.

5. The Staff Report, dated July 27, 2022, provides a detailed analysis of each standard of Section 21 of the DCZR and recommended approval of the Application. Staff Report, R. 000002-000217.

6. Plaintiffs James Sanderson, Theresa Sanderson, Jennifer Wagester, Tom Johanns, Connie Johanns, Douglas G. Wilson Jr. and Catherine Wilson (collectively "Plaintiffs") filed a Complaint for Judicial Review Pursuant to C.R.C.P. 106(A)(4) ("Complaint") arguing that the BOCC misapplied the DCZR and that the record is devoid of evidence that the Applicants satisfied the standards of the applicable section of the DCZR. Complaint, p. 2. Plaintiffs do not own land adjacent to the Property, but own land across Highway 83, a significant distance from the Property. Plaintiffs are neighbors to the east of the Property, across from Highway 83 with homes that are barely visible in the horizon from the Property. R. 001619, *Figure 1* below.



*Fig. 1*

7. Specifically, Plaintiffs claim that the following approval standards of Section 21 were not satisfied: Sections 2102.01, 2102.04, 2102.05, 2102.06, 2102.09 and 2102.10.

8. Applicants deny the allegations set forth in the Complaint. The Application provides all the required information pursuant to Section 21, which was ultimately deemed sufficient and approved by the BOCC. The BOCC did not exceed its jurisdiction, abuse its discretion, or act arbitrarily or capriciously in approving the Application. Rather, it determined the standards that must be applied and met (a decision that is entitled to deference), evaluated all the evidence before it, and properly approved the Application based on the record (“Record”).

#### **STANDARD OF REVIEW**

9. The Court may review the decision of a local governmental body exercising judicial or quasi-judicial functions to determine whether that entity exceeded its jurisdiction or abused its

discretion. C.R.C.P. 106(a)(4); *Hajek v. Bd. of Cty. Comm'rs for Boulder Cty.*, 461 P.3d 665, 668 (Colo. App. 2020).

10. When conducting a review pursuant to C.R.C.P. 106(a)(4), the Court applies a deferential standard, and “may not disturb the governmental body’s decision absent a clear abuse of discretion.” *Langer v. Bd. of Commissioners of Larimer Cty.*, 462 P.3d 59, 62 (Colo. 2020). A governmental body “abuses its discretion only when it applies an erroneous legal standard,” such as by misinterpreting or misapplying the law, “or when no competent evidence in the record supports its ultimate decision.” *Id.* The ultimate question is not whether the government chose the “best” option or whether the Court, ruling in the first instance, would have denied approval or adopted a different plan based on the existing record, “but rather whether the final adopted Plans ‘fell within the range of reasonable options’ available to the government in light of the record before it.” *In re Colorado Indep. Legislative Redistricting Comm’n*, 513 P.3d 352, 357 (Colo. 2021)(citing *Hall v. Moreno*, 270 P.3d 961, 973 (Colo. 2012)).

11. A governmental body’s interpretation of a local code is reviewed de novo, and the reviewing Court applies traditional rules of statutory construction, including giving provisions their ordinary and common-sense meaning. *Colorado Health Consultants v. City & Cty. of Denver through Dep’t of Excise & Licenses*, 429 P.3d 115, 121 (Colo. App. 2018). While interpretation of a code is reviewed de novo, interpretations of the code by the governmental entity charged with administering it deserves deference if they are consistent with the drafter’s overall intent. *Whitelaw v. Denver City Council*, 405 P.3d 433, 438 (Colo. App. 2017)(citing *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2017)).

12. There is no general requirement that a government body “make express findings to support its ultimate determinations.” *In re Colorado Indep. Legislative Redistricting Comm’n*, 513

P.3d at 361. No competent evidence exists in a record subject to judicial review only when the decision is “so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Langer*, 462 P.3d at 62 (quoting *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff’s Dep’t*, 196 P.3d 892, 900 (Colo. 2008)). “An action by an agency is not arbitrary or an abuse of discretion when the reasonableness of the agency’s action is open to a fair difference of opinion, or when there is room for more than one opinion.” *Colorado Health Consultants*, 429 P.3d at 121; see *No Laporte Gravel Corp. v. Bd. of Cty. Commissioners of Larimer Cty.*, 507 P.3d 1053,1060 (Colo. App. 2022).

13. In performing a review, the Court does not weigh the evidence. *Id.* Nor does it substitute its judgment for that of the governmental entity. *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008).

14. “Generally, a reviewing court should defer to the agency’s construction of a law it is charged with enforcing.” *Colorado Health Consultants*, 429 P.3d at 121. The Court presumes the governmental body intended a just and reasonable result. *Steamboat Springs Rental & Leasing, Inc. v. City & Cty. of Denver*, 15 P.3d 785, 787 (Colo. App. 2000). “The burden is on the party challenging an administrative agency’s action to overcome the presumption that the agency’s acts were proper.” *City and Cnty. of Denver v. Bd. of Adj.*, 55 P.3d 252, 254 (Colo. App. 2002). The challenging party must also establish prejudice. *No Laporte Gravel Corp.*, 507 P.3d at 1071. Remand is required only when the governmental body’s mistake affected the outcome of the proceedings. *Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 360 P.3d 186, 197 (Colo. App. 2015).



## ARGUMENT

*A. The BOCC reasonably determined that the Application satisfied all approval criteria of Section 21 of the DCZR.*

15. When reviewing the Application, the BOCC interpreted Section 21 and applied Section 21 correctly.

16. Pursuant to Section 21, a use by special review shall be approved only if the BOCC finds that the proposed use meets a list of standards. R. 003574. The approval standards in dispute, based on Plaintiffs' Complaint, are highlighted in *Figure 2*, below. *Id.*

A use by special review shall be approved only if the Board of County Commissioners finds that the proposed use:	
2102.01	Complies with the minimum zoning requirements of the zone district in which the special use is to be located, as set forth in this Resolution.
2102.02	Complies with the requirements of this Section 21.
2102.03	Complies with the Douglas County Subdivision Resolution.
2102.04	Will be in harmony and compatible with the character of the surrounding areas and neighborhood.
2102.05	Will be consistent with the Douglas County Comprehensive Master Plan, as amended.
2102.06	Will not result in an over-intensive use of land.
2102.07	Will provide roadway capacity necessary to maintain the adopted roadway level-of-service for the proposed development concurrently with the impacts of such development.
2102.08	Will provide public facilities and services necessary to accommodate the proposed development concurrently with the impacts of such development.
2102.09	Will not cause significant air, water, or noise pollution.
2102.10	Will be adequately landscaped, buffered, and screened.

*Fig. 2*

17. There is a significant amount of competent evidence, including the Application, Narrative, Management Plan, expert reports, Staff Report, and comments at the hearings that are in the Record that support the fact that *all* the approval standards set forth in Section 21, were met.

***B. The BOCC reasonably determined that the Application complied with Section 2102.01.***

18. Plaintiffs first claim that the Application does not comply with Section 2102.01 because the minimum setback requirements were not met. Plaintiffs' Opening Brief, p.7. "Structures and outdoor assembly areas are required to be 200 feet from all property boundaries per DCZR Section 2107.14.3..." Staff Report, R. 000924.

19. As stated in the Record and reiterated in Plaintiffs' Opening Brief, the proposed "tent pad and parking area are 200 feet or greater from existing property lines. The existing barn and bride and groom suite are within 200 feet of the Highway 83 property line..." Staff Report, R. 000924; Plaintiff's Opening Brief, p.7. Because "[t]he **existing** barn and proposed bride and groom structure are within 200 feet of the Highway 83 property line,"<sup>1</sup> the Applicants requested "a reduction of the event center setback as part of the USR request." Staff Report, R. 000921 (emphasis added); *see* Staff Report, R. 000924.

20. Applicants did not request a variance, but instead requested establishment of lesser setbacks for the already existing structures pursuant to DCZR Section 2106.01. Tr. 08/09/2022, p. 147: 5-18, p. 4:18-21; Staff Report, R. 000924. The only structures that require a reduction in the minimum setback are the Barn (that has been in its current location since 1911) and the Caretaker Residence (that was previously permitted when erected in 2014). Tr. 08/09/2022, p. 147:19-21.

21. "Per DCZR Section 2106.01 the Board may establish a lesser setback than required if adequate buffering is provided to mitigate noise, visual, or other impacts." Staff Report, R. 000924; *see* Tr. 08/09/2022, p. 9:4-7; *see also* Figure 3, below (R. 003575).

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<sup>1</sup> The setbacks are approximately 134 feet for the historic Barn and 58 feet for the Caretaker Residence. Staff Report, R. 000930.

2106.01	The Board may establish lesser setbacks than those required in this Section, and heights greater than those allowed in the underlying zone district, if the Board determines that adequate buffering is or will be provided to mitigate such concerns as noise, visual, dust, or other social or environmental impacts. The burden of proof is on the applicant to demonstrate such adequate mitigation measures.
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*Fig. 3*

22. As the Record shows, the Application included multiple mitigation proposals, including landscaping, a berm and screen walls to mitigate any noise, visual, dust or other impacts. Staff Report, R. 000924. The County determined that the mitigation proposed by Applicants would adequately buffer any social or environmental impacts. R. 000924 (“The rural appearance of these structures will be maintained, and the applicant has proposed landscaping, a berm, and screenwalls to mitigate impacts.”) The Planning Commission further considered the Noise Assessment Report by Cerjan Consultant, as evidence that adequate mitigation measures would be taken. R. 000930. Based on the Record, the Applicants met their burden of proof to demonstrate that adequate mitigation measures would be provided.

23. The County found that the approval of the Application complies with Section 2102.01 and that an approval by the BOCC should “include lesser setbacks for the existing barn and bride and groom suites...” R. 000929-30; R. 000932.

24. Plaintiffs claim that there is no record to suggest Applicants submitted measures adequately mitigating concerns to warrant reduced setbacks of Section 2106.01. However, as demonstrated above, there are multiple instances from the Staff Report, Application, and the transcript of the public hearing, that multiple mitigation measures were proposed by the Applicants which were determined to be adequate by the BOCC. The mere fact that Plaintiffs disagree with the evidence provided does not justify a remand of the BOCC’s decision. There is no abuse of discretion when the reasonableness of the BOCC’s action is open to a fair difference of opinion.

As the Record shows, the County interpreted Section 2102.01 along with Section 2106.01 and applied the standards in said sections to the proposals in the Application. Based on the evidence provided, the BOCC determined that the Application complied with Section 2102.01 along with Section 2106.01 and approved the Application with a reduction of the setback requirements.

***C. The BOCC reasonably determined that the Application complied with Section 2102.04.***

25. Plaintiffs next claim that the Application does not comply with Section 2102.04. Plaintiffs' Opening Brief, p. 12. Plaintiffs claim that the proposals in the Application will not be in harmony or be compatible with the character of the surrounding areas and neighborhood. *Id.*

26. "The scale and intensity of use and proposed mitigation allowed through the use by special review process is a key measure in evaluating neighborhood harmony and compatibility." Staff Report, R. 000930.

27. Here, the scale and intensity of the use of the Property is minimal. Only 6.7 acres of the 35-acre site will be devoted to the event center use. R. 000930. The remainder of the Property will continue to be used for agricultural purposes. R. 000921. Moreover, as stated in the Staff Report, "[t]he applicant's accessory agricultural buildings along Highway 83 are no longer utilized for agricultural purposes. The event center proposal will allow for the adaptive reuse of the historic barn structure." R. 000930.

28. The appearance of these structures will remain largely unchanged and will maintain the rural streetscape of agricultural buildings visible along Highway 83. R. 000931. The applicant has proposed landscaping and screen walls to soften the views of the facility from Highway 83. R. 000930. Based on the Record, Commissioner George Teal determined that the Application would not break the harmony of the area as it was a "very low-impact commercial enterprise" that was "hardly commercial." Tr. 08/09/2022, p. 161:7-11.

29. Plaintiffs also assert a concern for the increased traffic to the Property. Plaintiffs' Opening Brief, p. 12. It should be noted that Plaintiffs don't contest that Applicants provided extensive traffic information and a report from a retained expert for the County to consider in its determination. Instead, Plaintiffs merely reiterate their opinion on traffic concerns in the neighborhood, which were addressed in the application process and at the hearings. *Id.*

30. Here, the Applicants provided an extensive Traffic Impact Analysis by Turn Key Consulting, LLC to address any traffic concerns. R. 000180-196. Skip Hudson of Turn Key Consulting, LLC not only has 38 years of experience as an engineer, but he has served as a CDOT regional traffic and safety engineer for years. Tr. 08/09/2022, p. 34-35.

31. As addressed in the August 9, 2022 hearing, Applicants had extensive communication with Public Works Engineering and CDOT to address comments related to traffic and drainage impacts on Highway 83. Tr. 08/09/2022, p. 5. The Applicants worked with CDOT and County traffic engineers for 18 months to mitigate any traffic concerns. As recommended in the Traffic Impact Analysis the Application includes the proposed construction of a right-turn deceleration lane from Highway 83 to the Property. R. 000194.

32. As stated in the Staff Report, the Applicants' "traffic consultant answered several questions raised by the public and Commissioners regarding traffic impacts, methodology used to prepare the study, and the traffic monitoring system. The [A]pplicant[s] indicated that they heard the neighbors' concerns and would work on further solutions to address their concerns. If warranted based on traffic monitoring, they were committed to additional traffic improvements to Highway 83." R. 000929.

33. The BOCC further analyzed the traffic concerns at the Hearing. Commissioner Teal found that Highway 83 is already "a dangerous road" that needs to be addressed as an entirely

separate matter. Tr. 08/09/2022, p. 159:22-25. The BOCC stated that it was already working on a budget for safety improvements to Highway 83 and that “the turnout that will be demanded in order to grant this [Application] will actually help that.” Tr. 08/09/2022, p. 160:10-15.

34. Plaintiffs state that Commissioner Abe Laydon found that the Application did not satisfy Section 2102.04. Plaintiffs’ Opening Brief, p. 14. Although Commissioner Laydon voted against the approval of the Application, Commissioner Teal and Commissioner Lora Thomas both found that the criteria was met and voted as a majority in favor of the Application. As stated above, the Application was approved by a 2-1 vote.

35. As the Record shows, the BOCC interpreted Section 2102.04 and applied the standards in said sections to the proposals in the Application. Based on the evidence provided, the BOCC determined that the Application complied with Section 2102.04 and appropriately approved the Application.

***D. The BOCC reasonably determined that the Application complied with Section 2102.05.***

36. Plaintiffs also claim that the Application does not comply with Section 2102.05. Plaintiffs’ Opening Brief, p. 12. Plaintiffs argue that the proposals in the Application will not be consistent with the Douglas County Comprehensive Master Plan (“CMP”). *Id.*

37. The CMP establishes goals and objectives for developments in Douglas County. R. 000930. While the CMP states that approval criteria for land use applications requires a finding of compliance with the CMP, “...the competing values of the Plan must be balanced through the public review process to achieve the larger visions of the community.’ As such, the CMP acknowledges its own competing values, and that implementation can only be achieved through the balancing of community values during the review process.” Staff Report, R. 000931. Rather than acting as a checklist, the CMP contemplates the exercise of discretion by the BOCC that is

consistent with interpreting the CMP to allow flexibility in prioritizing its competing values.

38. Here, the BOCC reviewed the Staff Report, along with the Application and other documents and, in its discretion, determined that the Application is consistent with CMP. The County reviewed and specifically addressed Goal 3-3 and Objective 3-3B of the CMP and determined that the CMP goals and objectives within the proximity of the Property generally support the maintenance of rural character and conservation of open land. R. 000931 (*citing* Goal 3-3, Objective 3-3B of the CMP).

39. Here, as stated in the Staff Report, the Application allows for the “reuse of the existing barn and other accessory agricultural structures, which maintains the historic rural character of the site as visible from Highway 83 and provides a means to maintain the open pasture areas within other areas of the [Property].” *Id.* Moreover, since the event center activities are located away from the floodplain, wildlife movement along the West Cherry Creek will not be impeded. *Id.*

40. Plaintiffs reiterate that Commissioner Abe Laydon found that the Application did not satisfy Section 2102.05. Plaintiffs’ Opening Brief, p. 14. Although Commissioner Laydon voted against the approval of the Application, Commissioner Teal and Commissioner Thomas both found that the criteria was met and approved the Application. As stated above, the Application was approved by a majority 2-1 vote in favor of the Application.

41. As the Record shows, the BOCC interpreted Section 2102.05 and applied the standards in said section to the proposals in the Application. Based on the evidence provided, the BOCC determined that the Application complied with Section 2102.05 and appropriately approved the Application.

***E. The BOCC reasonably determined that the Application complied with Section 2102.06.***

42. Plaintiffs claim that the Application does not comply with Section 2102.06 as the proposals in the Application will result in an over-intensive use of land. Complaint, p. 14.

43. As stated above, the Application proposes using only 6.7 acres of the 35-acre property, while maintaining the existing structures and continuing to use the rest of the property for agricultural purposes. R. 000921. Approximately 29 acres will remain open for wildlife, cattle grazing or cultivation of hay. R. 000931. It should be noted that the permit area is located within an area of the Property that is already developed. R. 000931.

44. As the Planning Commission evaluated, events will only take place three days per week, generally between the May through October wedding season. Staff Report, R. 000930.

45. Based on the Application and associated documents, the Planning Commission determined that the viable use of this portion of the Property helps preserve the remaining open land. R. 000931. The County used its discretion and determined that, based on the evidence, there would not be an over-intensive use of the Property.

46. Here, the BOCC weighed the evidence, reviewed the Staff Report and determined that the Application complies with Section 2102.06 and appropriately approved the Application.

***F. The BOCC reasonably determined that the Application complied with Section 2102.09.***

47. Plaintiffs claim that the Application does not comply with Section 2102.09 as the proposals in the Application will cause significant noise pollution. Plaintiffs' Opening Brief, p. 9. As stated by the Plaintiffs, the parties disputed the extent of noise pollution generated by the proposed use of the Property at the August 9, 2022 Hearing. *Id.*

48. The Application includes measures the Applicants would take to remain in compliance with the noise requirements. The Applicants would construct screening, a significant



berm and landscaping to not only alleviate noise levels to neighbors across Highway 83, but to also block existing noise levels generated from other users of Highway 83 itself, as it is a loud and busy highway. R. 000924. The Application also proposes that amplified noise will be restricted to inside the Barn and traffic will be monitored to allow the County to verify impacts as well as require additional improvements, if warranted. R. 000930. Again, the approved Application is an operation that will be continuously monitored and can be revoked.

49. The Applicants provided information regarding their compliance with Section 2102.09 through their Application, including a Noise Assessment Report by Cerjan Consultant that was later supplemented. R. 000141-148; R. 002204-2207. “The noise study factored ambient noise from Highway 83. The predicted noise levels from the Barn were compared to daytime and nighttime noise limits to assess compliance with County requirements. The noise study found that predicted noise levels will comply with applicable noise regulations.” Staff Report, R. 000927. The County reviewed the Noise Assessment Report and found that it predicted that noise from the event center will not exceed County standards, and the Management Plan limits events to 150 persons. Staff Report, R. 000930. The Applicants must adhere to the Management Plan in order to maintain their permit.

50. Staff Report discussed Applicants’ Narrative, the Noise Assessment Report, the set times the events would take place, and the application of DCZR Section 2107.14.4 to the proposal. R. 000927. After reviewing all the evidence, the County found that the proposed use as described in the Application would not cause significant air, water or noise pollution. R. 000931, 948.

51. Plaintiffs also provided their own expert report. In Plaintiffs’ Opening Brief, Plaintiffs attempt to rehash their expert’s arguments that attack Mr. Cerjan’s Noise Assessment Report. Plaintiffs’ Opening Brief, p. 10. The BOCC reviewed all the reports and Commissioner

Teal noted that although he found the reports to be contradictory, the evidence did not support any concern of noise pollution. Tr. 08/09/2022, p. 163: 20-22. Commissioner Teal reiterated that this was an application for a routinely inspected permit and that the County would need to continue to monitor the noise levels based on the terms of the permit. Tr. 08/09/2022, p. 162:5-7.

52. Commissioner Thomas agreed and stated that the Applicants “have worked to mitigate these issues and ...they have met these requirements for this proposal, keeping in mind that if [the Applicants] do not meet the management plan requirements, [the Applicants] know that [their] permit can be revoked.” Tr. 08/09/2022, p. 166:9-13.

53. The mere fact that Plaintiffs do not agree with the evidence provided does not justify a remand of the BOCC’s decision. There is no abuse of discretion when the reasonableness of the BOCC’s action is open to a fair difference of opinion.

54. Here, the BOCC determined that there was no concern of noise pollution based on the competing expert reports. The BOCC made such a reasonable determination in light of the Record before it.

55. Based on the Staff Report, Application and testimony from the expert, the BOCC determined that although there was contradictory evidence, the Applicants’ evidence was more credible. As determined in the Staff Report, the Noise Assessment Report seemed credible and the proposals in the Application would be in compliance with Section 2102.09. Here, the BOCC weighed the evidence, reviewed the Staff Report and determined that the Application complies with Section 2102.09 and appropriately approved the Application.

***G. The BOCC reasonably determined that the Application complied with Section 2102.10.***

56. Finally, Plaintiffs claim that the Application does not comply with Section 2102.10 as the proposals in the Application will not be adequately landscaped, buffered, and screened.

Plaintiffs' Opening Brief, pp. 14-15.

57. Plaintiffs' claim that the Application does not comply with Section 2102.10 because the Record is allegedly devoid of any "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." Plaintiffs' Opening Brief, p. 15. However, Section 2102.10 does not require Applicants to propose landscaping that prevents the view of improvements from neighboring properties. Section 2102.10 merely states that the proposed use "[w]ill be adequately landscaped, buffered, and screened." The plain language of Section 2102.10 requires the Application to have proposals of *adequate* landscaping, buffering and screening. The County has the discretion to determine what is *adequate*. Any photos or arguments regarding the view from neighbors of the already existing, permitted structures is irrelevant and misleading.

58. Here, the County found that the Application would be adequately landscaped, buffered and screened based on the Application, Staff Report, Management Plan and testimony. As stated in the Staff Report, "[t]he rural appearance of these structures will be maintained, and the applicant has proposed landscaping, a berm, and screenwalls to mitigate impacts." R. 000924. As further determined by the County, after reviewing the proposals in the Application, "The [B]arn and [Caretaker Residence] will retain their historic rural appearance and berms and landscaping are intended to screen the use and parking areas." Staff Report, Record 000930.

59. Here, the BOCC weighed the evidence and determined that the Application complies with Section 2102.10 and appropriately approved the Application.

### **CONCLUSION**

As described above, there is substantial evidence in the Record to support the BOCC's

approval of the Application. The County weighed the evidence and determined that based on the evidence, the Application met all the standards. Although Plaintiffs disagree, the Court must give deference to the County interpretation of Section 21. The County made express findings in its Staff Report and at the hearing to support its ultimate decision. No rule, regulation or statute required the BOCC to adopt written findings of fact or conclusions of law for the approval of a use by special review. The ultimate question is not whether the County chose the “best option” or whether the Court would have denied approval, but rather whether the Application fell within the range of reasonable options available to the County in light of the record. Here, although Plaintiffs believe that the approval of the Application was not the best option, the County reasonably determined that, in light of the Record and the public good, the Application met all the approval standards set forth in Section 21. Plaintiffs are requesting that this Court supplant its authority over the authority of elected officials who interpreted the County’s rules and approved the Application by a majority vote. Such a request is unjustified. Accordingly, the relief requested in Plaintiffs’ Complaint should be denied.

**RESPECTFULLY SUBMITTED** this 20th day of January 2023.

**FOLKESTAD FAZEKAS BARRICK &  
PATOILE, P.C.**

ORIGINAL SIGNATURE ON FILE IN THE  
OFFICES OF FOLKESTAD FAZEKAS  
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*/s/ Lauren O. Patton*

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Louie Miller

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20th day of January 2023, I served via Colorado Courts E-Filing System, a true and correct copy of the foregoing **DEFENDANTS PAMELA SOLLY'S AND LOUIE MILLER'S ANSWER BRIEF TO PLAINTIFFS' OPENING BRIEF**, addressed as follows:

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