

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109	<div style="text-align: center; padding-top: 100px;"> (COURT USE ONLY) </div>
<b>JAMES SANDERSON; THERESA SANDERSON;  JENNIFER WAGESTER; TOM JOHANNNS; CONNIE  JOHANNNS; DOUGLAS G WILSON JR; and  CATHERINE WILSON</b> , all Colorado residents, <i>Plaintiffs</i> ,  v. <b>THE BOARD OF COUNTY COMMISSIONERS OF  DOUGLAS COUNTY</b> , COLORADO, a political subdivision of the State of Colorado; PAMELA SOLLY, and LOUIE MILLER, Colorado residents. <i>Defendants</i> .	
<b>Attorneys for Defendants The Board of County  Commissioners of Douglas County (including all of the  individual Commissioners in their official capacity):</b> Christopher K. Pratt, #42673 Kelly Dunnaway, #31896 William A. Tuthill, III, # 12487 Office of the Douglas County Attorney 100 Third Street Castle Rock, CO 80104 Phone: 303-660-7414 E-mail: <a href="mailto:kdunnawa@douglas.co.us">kdunnawa@douglas.co.us</a> ; <a href="mailto:cpratt@douglas.co.us">cpratt@douglas.co.us</a> ; <a href="mailto:watuthill@gmail.com">watuthill@gmail.com</a>	<b>Case No.: 2022CV30649</b>  <b>Courtroom/Division: 5</b>
<b>BOARD OF COUNTY COMMISSIONERS' ANSWER BRIEF TO PLAINTIFFS'  OPENING BRIEF REGARDING CLAIMS AGAINST DOUGLAS COUNTY</b>	

The Board of County Commissioners of Douglas County, through its legal Counsel,  
Douglas County Attorneys Christopher K. Pratt and Kelly Dunnaway, and William A. Tuthill III,  
WATLegal LLC, pursuant to C.R.C.P. 106 (a)(4)(VII), hereby submits this Answer Brief  
regarding Plaintiffs' Rule 106 claim against the County.

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**I. STATEMENT OF THE CASE AND BACKGROUND**

This Case involves a decision by Douglas County to approve a use by special review for property owned by Defendants Solly and Miller (the “Applicants”) to become an event center. There is a residence, a Barn, a Metal Structure, and other outbuildings already existing on the property. The Applicants propose no changes to the locations of the structures for the venue to be operated by them; an addition to the Barn to increase its size is proposed. The property at issue is slightly larger than 35 acres and is located in an area known as Cherry Valley. Prior to the approval of the use by special review, uses allowable by right would have included agricultural and residential. The existing structures support the existing agricultural and residential uses and are visible from some of the surrounding area due to the topography of the land. The Planning Commission reviewed the application, after which the applicants sought formal approval by the Board of County Commissioners in accordance with the process established by the Douglas County Zoning Resolution (DCZR). Following a hearing before the Board of County Commissioners, at which Plaintiffs had the opportunity to present evidence and provide testimony, the Board voted to approve the Use by Special Review, with conditions that are not related to Plaintiffs’ concerns. Plaintiffs have taken umbrage with the County’s actions and initiated this Rule 106 challenge to those actions. The Plaintiffs also filed claims against the Defendants who are the owners and operators of the facility.

## **II. OVERVIEW**

Although the Plaintiffs acknowledge that the only basis upon which this Court could rule in their favor is to find an abuse of discretion, they confuse an outcome that they disagree with as an abuse of discretion. Plaintiffs fail to acknowledge the evidence in the record that supports the Board's decision.

## **III. STANDARD OF REVIEW**

### **A. This is Solely a Record Review**

Review under Rule 106 is limited to a determination of whether the quasi-judicial body or officer has exceeded its jurisdiction or abused its discretion based on the evidence in the record before the quasi-judicial body or officer. The Rule contemplates solely a record review. Rule 106 applies to quasi-judicial actions, *Baldauf v. Roberts*, 37 P.3d 483 (Colo. App. 2001). “As a general rule, judicial review by way of C.R.C.P. 106(a)(4) is the exclusive remedy for one challenging a rezoning determination on a parcel of property,” *Norby v City of Boulder*, 577 P.2d 277, 280 (Colo. 1978), citing *Westlund v. Carter*, 565 P.2d 920 (Colo. 1977). Where a specific amendatory zoning decision is challenged that relates to a specific property, the exclusive remedy is to bring an action for review under Rule 106 (a)(4), and dismissal of related claims for declaratory relief and an injunction is proper. *Lorenz v. City of Littleton*, 550 P.2d 884 (Colo. 1976). The claims against the County are to be decided based on the evidence in the record below and the applicable law.

### **B. The Burden of Proof is on the Plaintiffs to Show they are Entitled to Relief Beyond a Reasonable Doubt**

The party challenging the decision below bears the burden of demonstrating that the decision was arbitrary or capricious, or that the decision-making body lacked jurisdiction. *Whitelaw v. Denver City Council*, 405 P.3d 433 (Colo. App. 2017); *Clary v. County Court*, 651

P.2d 908 (Colo. App. 1982). *Corper v. City and Cnty. of Denver*, 552 P.2d 13 (Colo. 1976). Even more specifically, “[o]ne claiming the invalidity of a rezoning ordinance has the burden of establishing its invalidity beyond a reasonable doubt.” *Corper* at 15, citing *Wright v. City of Littleton*, 483 P.2d 953 (Colo. 1971) and *Bird v. City of Colorado Springs*, 489 P.2d 324 (Colo. 1971).

The Court’s review is limited to the record before the lower tribunal. *Feldewerth v. Joint Sch. Dist 28-J*, 3 P.3d 467 (Colo. App. 1999). The Court does not weigh the evidence or substitute its judgment for that of the lower body. *Coleman v. Gormley*, 748 P.2d 361 (Colo. App. 1987); *Cline v. City of Boulder*, 532 P.2d 770 (Colo. App. 1975); *Save Park County v. BOCC of Park County*, 969 P.2d 711 (Colo. App. 1998), *affd.* on other grounds, 990 P.2d 35 (Colo. 1999); *State Bd. of Med. Exam’rs v. Noble*, 177 P. 274 (Colo. 1918).

#### **IV. ARGUMENT**

Here, Plaintiffs do not truly claim that the Board exceeded its jurisdiction in approving the Application. Nor do they allege that Rule 106 could not supply a plain, speedy, and adequate remedy. Instead, they limit their argument to a narrow allegation that the Board’s decision to allow the use by special review fails to comply with each and every review criteria that the Board considers in evaluating an application, and allege that such purported failure is a violation of Section 2102 of the DCZR, and that the Board and the planning department have no discretion whatsoever in interpreting how well the application meets the guidelines to be considered, compared to the Plaintiffs’ interpretation. This is the only argument that Plaintiffs advance in support of their allegation that the Board abused its discretion. Plaintiffs conflate their failure to be persuaded with what they perceive to be illegal, and in this they are wrong.

**A. There Was No Abuse of Discretion - Ample Evidence in the Record Supports the Board's Decision**

An abuse of discretion means that there is “no competent evidence to support the decision.” *Ross v Fire and Police Pension Ass’n*, 713 P.2d 1304 (Colo. 1986); *Ford Leasing Dev. Co. v. BOCC*, 528 P.2d 237 (Colo. 1974). Furthermore, the proceedings before the Board are entitled to a presumption of regularity, honesty, integrity, and impartiality. *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 228 (Colo. App. 1983); *see also, Withrow v. Larkin*, 421 U.S. 35, 58 (1975) and *Best v. La Plata County Planning Comm’n*, 701 P.2d 91, 96 (Colo. App. 1984). “No competent evidence” means that the ultimate decision of the body below is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *BOCC of Routt County v. O’Dell*, 920 P.2d 48 (Colo.1996); *Cruzen v. Career Serv. Bd. of City and County of Denver*, 899 P.2d 373 (Colo. App. 1995); *McCann v. Lettig*, 928 P.2d 816 (Colo. App. 1996); *Whitelaw, infra*; *Carney v. Civil Serv. Comm’n*, 30 P.3d 861 (Colo. App. 2001).

Ample evidence was provided at the hearing in support of approving the Use by Special Review for the subject property. For openers, Plaintiffs concede in their own Opening Brief at page 6 that of the twelve review criteria identified in DCZR Section 2102, the applicant fulfilled the vast majority of them. In addition, even for those that the Plaintiffs argue were not met, they acknowledge that there are variations and interpretations that support the applicants’ proposed Use by Special Review. They also concede that several citizens spoke in favor of the application. Plaintiffs' Opening Brief at page 4, citing Record at pp. 65 and 137.

For example, at page 7 of their Opening Brief, Plaintiffs state that “the Barn [the primary facility for use as an event center] satisfies the 100-foot setback of Section 307.” They further admit that 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.” Plaintiff’s Opening Brief at page 8, citing DCZR 2106.01. Plaintiffs go so far as to admit that the BOCC has the power under DCZR Sec. 21 to make an exception to the setback requirements or grant a variance, and suggest that this is precisely what the BOCC has effectively done. This determination by the Board is implicit in its decision to grant the Use by Special Review, being fully aware of the requirements and exceptions in the DCZR.

Plaintiffs further confess that there was conflicting evidence on topics such as noise (“the parties disputed the extent of noise pollution generated by the proposed uses of the Property”). Plaintiffs’ Opening Brief at p. 9 and referencing the Applicant’s noise expert presentation from Jeff Cerjan, Record at 1102-1109. Instead, as recognized by the Commissioners voting in favor of approval, common sense dictates that an appropriate interpretation as to whether a property is compliant with the standards of the DCZR may require the weighing of conflicting evidence and viewpoints. Commissioner Teal’s comments, as acknowledged by the Plaintiffs in their Brief, reflect that. Common understanding would confirm nothing less.

The Douglas County planning department and the BOCC are entitled to engage in a common sense interpretation of what it means to determine whether the uses of the Property are “in harmony and compatible with the character of the surrounding neighborhood” under the DCZR and their interpretation is entitled to deference by the Court. Although the Court is “not bound by an agency’s construction of its resolutions and ordinances,” *Sheep Mountain Alliance v. Bd. of County Comm’rs*, 271 P. 3d 597, 601 (Colo. App. 2011), “the construction of an ordinance by administrative officials charged with its enforcement should be given deference by



the courts.” *Abbott v. Bd. of County Comm’rs* 895 P. 2d 1165, 1167 (Colo. App. 1995). If there is a “reasonable basis” for the official’s application of the law, “the decision may not be set aside on review.” *Sheep Mountain, supra, citing Platte River Environmental Conservation Org. v. Nat’l Hog Farms, Inc.*, 804 P.2d 290 (Colo. App. 1990). See also, *Humana, Inc. v. Bd. of Adjustment*, 537 P. 2d 741 (Colo. 1975) (testimony of the zoning administrator who dealt with zoning ordinances on a day-to-day basis was considered significant in construing language in the ordinance).

Here, the Staff Report from the Chief Planner, the Planning Manager, and the Assistant Director of Planning Services, attached as Ex. 4 to Plaintiff’s Opening Brief and Record at pp. 2-12, together with the presentation to the Board, sets forth how the Application meets all of the review standards for rezoning pursuant to Section 2102 of the DCZR. This Staff Report alone supplies sufficient evidence that supports the interpretation that the proposed screening, landscaping, noise reduction impacts, and traffic mitigation were sufficient. The Staff Report also concludes that the setbacks are acceptable within the DCZR (Record at p. 5). These review standards, and evidence reflecting compliance with these standards, can be found throughout the Record, such as the summary found in the Staff Report, sections VII and VIII (Record at pp. 9-11), and in the Application for Use by Special Review itself, in which the Applicants describe compliance with the standards. See Ex. 2 to Plaintiffs’ Opening Brief and Record at pp. 934-951.

In addition, the Staff Report addresses the arguments made by Plaintiffs in this Rule 106 action and addresses them. At pages 4,5, and 6 of the Staff Report, the people charged with interpreting and administering the DCZR consider the argument that not all activities on the site, including storage, will be invisible from “adjoining land or public right-of-way.”

As acknowledged by the Plaintiffs, the application included approaches to “landscape, buffer, and screen” the uses on the Property as part of the application. Plaintiffs’ Opening Brief pp. 14-15; Record at 934-951, Record at 1172. Because all parties appear to concede that topography makes it impossible to eliminate views (in fact, Plaintiffs’ own exhibits show that the existing Barn is clearly visible from adjoining property), this approach is consistent with the DCZR as interpreted by the Planning Department and the BOCC. See, for ex., Record at 982 - 1014.

### **B. The Master Plan is a Guidance Document, Not a Strict Legal Requirement**

Plaintiffs assert that portions of the proposed Use by Special Review do not comport with their interpretation of the Douglas County Comprehensive Master Plan. Those concerns relate to fluid concepts subject to interpretation, such as “maintaining agricultural lifestyle and rural character.” Plaintiffs also point to Master Plan policies that encourage “Non-Urban land uses” such as “farming, ranching, large lot residential, parks, and open spaces.” But while Plaintiffs complain that a prospective event center may lead to increased traffic and vehicles such as buses, they fail to recognize that activities such as farming and ranching utilize large trucks to deliver and or remove feed, livestock, and supplies, that parks bring participants to engage in sporting activities or festivals, and that even open space often requires trailheads and parking areas for visitors and can promote increased traffic and use by people who are not familiar with the area. Plaintiffs also ignore the testimony of Ms. Solly, who provided historical evidence and newspaper articles that show the Barn being used for barn dances for social gatherings of 200 people going as far back as 1911. Transcript at pp. 24-29.

From a legal perspective, a Master Plan is a guidance document, intended to provide an overall, coherent approach to development and land use. It is not a legally binding set of rules

that requires strict adherence. By definition, Master Plans acknowledge that there are often competing goals and interests, not all of which can be met by any particular proposed use. C.R.S. 30-28-106(3)(a). In *Theobald v. Bd. of County Comm'rs*, 644 P. 2d 942 (Colo. 1982), the Colorado Supreme Court conducted an extensive analysis of the role of master plans in individual zoning and land use decisions:

Conceptually, a master plan is a guide to development rather than an instrument to control land use. (cites omitted). On the other hand, it is the task of the legislative body charged with zoning to individually apply the broad planning policies to specific property, consistent with the public interest, and with notions of due process and equal protection (citations omitted).

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[T]he master plan itself is only one source of comprehensive planning, and is generally held to be advisory only, and not the equivalent of zoning, nor binding upon the zoning discretion of the legislative body. (extensive cites to treatises and decisions from other states omitted).

Id. at 948-9.

Even where a County's adopted subdivision, zoning, platting, planned unit development, or other similar regulations refer to compliance with a master plan, it is still an advisory document and does not make the master plan binding. *Friends of the Black Forest Pres. Plan, Inc. v. Bd. of County Comm'rs of El Paso*, 381 P.3d 396 (Colo. App. 2016). The DCZR makes this explicitly clear in Section 124:

While the approval criteria for many land use applications defined herein require "compliance with", "consistency with", or "general conformance with" the Comprehensive Master Plan (CMP) or the goals, objectives, and policies of the CMP, the individual goals, objectives, and policies are not, themselves, approval criteria. The Board will consider the diversity of community values, applicable laws and regulations, private property rights, and unique characteristics of each application when balancing the goals, objectives, and policies set forth in the CMP.

DCZR Section 124 Interpretation

On the issue of compliance with the Master Plan, while one Commissioner agreed with Plaintiffs, a majority did not. That is the prerogative of the elected officials who serve on the BOCC. There is no evidence in the record to suggest that the Commissioners were unaware of the appropriate review criteria, they simply chose to interpret and apply them differently. The mere fact that there may have been considerable testimony in opposition to the application does not mandate a different result.

Although Plaintiffs can point to items in the record that might have supported a different outcome, Colorado Courts have repeatedly and consistently held that is not the standard to be applied here. Where evidence is conflicting, the hearing body's findings are binding. *Vondra v. Colo. Dept. of Corr.*, 226 P.3d 1165 (Colo. App. 2009). "An action by an administrative 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." *Khelik v. City and County of Denver*, 411 P.3d 1020, 1023 (Colo. App. 2016), citing *Bennett v. Price*, 446 P.2d 419, 420-21 (Colo. 1968).

Plaintiffs concede that Commissioner Teal knew the requirements of the DCZR, but still voted to approve the Use by Special Review. Clearly, Plaintiffs would have interpreted the evidence and the DCZR differently, but two Commissioners, including Commissioner Teal, reached a different result. See Plaintiffs' Opening Brief at pp.11 and 14, referring to the Transcript at p.160. Plaintiffs also acknowledge that the DCZR process would require that a majority of the Board vote to deny the application. Commissioner Teal's rationale alone provides support for the decision of the BOCC, and he was joined by another Commissioner in his vote to approve the application.

## **V. CONCLUSION**

In this case, there is competent evidence in the record that supports the Board's decision. The Board's proceedings are entitled to a presumption of regularity, there is clear evidence that the additional landscaping and mitigation proposed in the Use by Special Review addresses the issues raised by Plaintiffs at the hearing, and there was support justifying the outcome. Plaintiffs were given sufficient notice and opportunity to make their case below, but simply failed to prevail. This Court cannot substitute its judgment (or the Plaintiffs') for that of the Board of County Commissioners. Plaintiffs have failed to demonstrate a legally recognized abuse of discretion and have not met their burden of proof.

**WHEREFORE**, the County respectfully requests that the Court find that there is evidence in the Record to support the decision of which Plaintiffs complain, determine that Plaintiffs have failed to meet their burden of showing that the Board of County Commissioners exceeded its jurisdiction or abused its discretion, and deny Plaintiffs' Claims under Rule 106.

**DATED** January 20, 2023.

DOUGLAS COUNTY ATTORNEY'S OFFICE

Special Counsel, WATLegal LLC

By: /s/ William A. Tuthill III  
William A. Tuthill III, Reg. No. 12487

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on this 20th day of January, 2023, a true and correct copy of the foregoing **BOARD OF COUNTY COMMISSIONERS' ANSWER BRIEF TO PLAINTIFFS' OPENING BRIEF REGARDING CLAIMS AGAINST DOUGLAS COUNTY** was served via Colorado Courts E-Filing to all counsel of record.

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