

DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way Castle Rock, CO 80109	DATE FILED: February 3, 2023 1:06 PM FILING ID: 634976B98999D CASE NUMBER: 2022CV30649
PLAINTIFFS: 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, v. DEFENDANTS: BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, COLORADO; PAMELA SOLLY, a Colorado resident; and LOUIE MILLER, a Colorado resident.	<p style="text-align: center;">▲ COURT USE ONLY ▲</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: jcotter@spencerfane.com ; ltaylor@spencerfane.com	Case Number: 2022CV030649 Division: 5 Courtroom:
<p style="text-align: center;">PLAINTIFFS' REPLY BRIEF IN SUPPORT OF OPENING BRIEF</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 Reply Brief¹ at 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”)

¹ Because Defendants’ Answer Briefs raise similar arguments, Plaintiffs’ Reply Brief responds to both the BOCC’s and Applicants’ Answer Briefs.

application (“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.

The arguments to the contrary in the BOCC’s and Applicants’ Answer Briefs fail for several reasons. First, the BOCC applies the incorrect legal standard in its Answer Brief. Second, Section 2102 of the Douglas County Zoning Resolution (“Zoning Resolution”) requires Applicants to satisfy each and every requirement of Section 2102—not a “vast majority.” Third, and notwithstanding the BOCC’s and Applicants’ Answer Brief arguments, the Application does not comply with Sections 2101.01, 2102.04, 2102.5, 2102.09, or 2102.10. Both the BOCC and Applicants erroneously supplant the Douglas County’s staff’s (“Staff”)’s July 27, 2022 report (“Staff Report”) for the BOCC’s decision-making authority. Not only does this supplantation disregard the plain language of the Zoning Resolution, the record also does not reflect the BOCC evaluated extremely pertinent evidence omitted from the Staff Report. That is, there is no competent evidence in the record to support a finding that Applicants have, in fact, satisfied each of the approval standards of Section 2102. The Application should not have been approved and the BOCC abused its discretion.

II. ARGUMENT

A. The applicable legal standard for a C.R.C.P. 106(a)(4) claim is whether the local government misapplied the law or no competent record evidence supports its decision.

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 (Colo. 1996)). The standard is not, as the BOCC argues, “beyond a reasonable doubt.” Beyond the fact the BOCC cites archaic cases for this burden of proof (which have not been cited in the twenty-first century), this “beyond a reasonable doubt” burden is specific to when “[o]ne [is] claiming the invalidity of a rezoning ordinance.” See *Corper v. City and Cnty. of Denver*, 552 P.2d 13 (Colo. 1976) (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)). As made clear by Plaintiffs’ Complaint, Plaintiffs are not claiming invalidity of any section of the Zoning Resolution. BOCC’s proposed burden of proof is, therefore, inapplicable here.

B. The BOCC’s approval of the Application based on compliance with a “vast majority” of the Zoning Resolution is a misapplication of the Zoning Resolution.

Satisfying a vast majority of the Zoning Resolution does not comply with the plain language of the Zoning Resolution. Per Section 2102, “[a] use by special review shall be approved only if the Board of County Commissioners finds that the proposed use,” complies with/satisfies Sections 2102.01 through 2102.12. Section 2102, Ex. 1 to Plaintiffs’ Opening Brief, at Record 003574. Employing ordinary statutory interpretation canons, if a special use application does not comply with each Section 2102.01 through 2102.12, the BOCC cannot approve the use by special review. Any approval of the Application based on compliance with a “vast majority” of the Zoning Resolution—not each Section 2102.01 through 2102.12—is a misapplication of the Zoning Resolution.

C. The Application does not comply with Section 2102.01.

Neither the BOCC's nor Applicants' Answer Briefs dispute that the Barn and Metal Structure violate the setback requirements of Subsection 307 (Minimum Setbacks) of Section 3 (A1 Agricultural One District) and Section 2107.14.3. Rather, both argue that reduced setbacks were "effectively" or "implicitly" approved by the BOCC when it approved the Application. But, when looking at transcript of the August 9, 2022 BOCC public hearing on the Application ("BOCC Hearing"), the record does not reflect that the BOCC actually evaluated whether Section 2106.01 had been satisfied—let alone referenced Section 2106.01—or whether there would be **adequate** buffering of the Property (including buffering of the Barn and Metal Structure (and other structures proposed within the setbacks)) to mitigate concerns such as noise, visual, dust, or other social or environmental impacts.² *See, generally*, Ex. 9 to Plaintiffs' Opening Brief.

Both the BOCC and Applicants cite to the Staff Report for support that they "requested establishment of lesser setbacks for the already existing structures pursuant to DCZR Section 2106.01." Both then argue that because Staff commented "Applicant has proposed landscaping and screen walls to soften the views of the facility from Highway 83," and that "noise study predicts that noise from the event center will not exceed County standards," Applicants' burden under Section 2106.01 was satisfied. *See* Staff Report, Record 000921–933, at Record 000930, attached as ***Exhibit R1***. But, Staff's comments focus only on buffering of visual impacts of structures as viewed from Highway 83. *See id.* Staff's comments neglect to address whether there

² In addition to Section 2106.06 of the Zoning Resolution, the Application does not comply with Section 2102.10 which requires the proposed uses of the Property "[w]ill be adequately landscaped, buffered, and screen." Given the related nature of these sections, arguments concerning adequate buffering/screening/landscaping are consolidated under this section.

will be adequate buffering of visual (as viewed from locations other than Highway 83), noise, social, and environmental impacts. *See, generally, id.*

As the record reflects, several Douglas County residents³ are concerned with the view of the Property from properties situated above the Property and Highway 83, and light emanating from the Property, specifically from the Barn and Metal Structure late in the evening. *See* Ex. 9 to Plaintiffs' Opening Brief, at p. 65, l. 9–p. 137, l. 16; Ex. 10 to Plaintiffs' Opening Brief, at Record 000226–228. The BOCC argues because it is “impossible” to mitigate views of the proposed uses and improvements and light pollution given the topography of the area, Applicants' proposed buffering must be adequate. This assumption is flawed. Rather, the inability to mitigate views and light pollution at properties in the immediate vicinity of the Property highlights the incongruent nature of the proposed uses and improvements of the Property and demonstrates that visual concerns cannot be adequately mitigated.

Further, Applicants argue Sections 2106.06 and 2102.10 do not require Applicants to prevent view of improvements from neighboring properties. This assumption is likewise flawed. The Zoning Resolution requires Applicants to serve notice and a hearing on those persons whose interests are likely to be affected by the approval of the Application. *See, e.g.*, Section 2109, Record 003590–3593, at Record 003590, attached hereto as ***Exhibit R2*** (“The applicant shall also provide stamped letter sized envelopes addressed to the abutting landowners, and other landowners as requested by staff.”); Section 2113, Record 003598–3600, at Record 003598, attached hereto as

³ Approximately 214 Douglas County residents spoke at the BOCC Hearing or petitioned in opposition to approval of the Application, while only two spoke in favor at the BOCC Hearing. *See* Ex. 7 to Plaintiffs' Opening Brief; Ex. 9 Plaintiffs' Opening Brief, at p. 65, l. 9–p. 137, l. 16. Of those who spoke in favor at the BOCC Hearing, none live within a half mile of the Property, and each primarily spoke to Applicants' character. *See* Ex. 9 Plaintiffs' Opening Brief, at p. 65, l. 9–p. 137, l. 16.

Exhibit R3 (“At least 14 days prior to the Planning Commission hearing and the Board hearing, the applicant shall mail a written notice of the hearing by first class mail to the address of each abutting landowner.”); *see also Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 627 (Colo. 1988) (“The existence of a statute or ordinance mandating notice and a hearing to those persons whose interests are likely to be affected by the decision is a clear signal that the governmental decision is to be regarded as quasi-judicial for the purpose of judicial review under C.R.C.P. 106(a)(4).”). To say that the concerns of and impact to Douglas County residents—including those immediately adjacent to the Property—whose interests are likely to be affected by approval of the Application do not need to be considered disregards the plain text of the Zoning Resolution and renders the entire process of obtaining a use by special review arbitrary.

While the Staff Report does note Applicants submitted a noise study, that’s where Staff’s inquiry ends. The record does not reflect noise generated by the Property will be adequately buffered or screened. As discussed in Plaintiffs’ Opening Brief and the following section, Applicants’ noise expert’s study is deficient for a number of reasons and the Application does not satisfy Section 2102.09. *See* Plaintiffs’ Opening Brief, Section IV(B)(3); *see also infra*, Section II(D). Beyond this, the only reference to potential buffering or screening in Applicant’s noise study are “existing manmade structures” on the Property.⁴ *See* Ex. 15 to Plaintiffs’ Opening Brief, at Record 00106. But these existing manmade structures are the structures that will prominently emit noise on the Property, in addition to several outdoor features. *See id.* It is paradoxical how the

⁴ Commissioner Teal comments in the BOCC Hearing that trees on the northeast side of the Property will “soak[] up” a lot of the noise. Ex. 9, at p. 162, l. 21–23. But, there is no evidence from either Applicants’ or Plaintiffs’ noise study to support this conclusion. *See, generally*, Ex. 15 to Plaintiffs’ Complaint & Ex. 16 to Plaintiffs’ Complaint. Further, the trees are on the northeast side of the Property and inherently cannot be a barrier for sounds emanating in directions other than northeast.

structures prominently emitting noise can also be the buffer or screen of the same noise. Indeed, Applicant's noise expert admitted that the "immediate area is largely flat and thus little to no noise reduction due to terrain is expected." *Id.* at Record 00105. Other than these "existing manmade structures," the record does not reflect noise generated by the Property will actually be buffered or screened—let alone adequately.

Moreover, Applicants' and BOCC's reliance on the Staff Report as the end all-be all disregards the plain meaning of the Zoning Resolution. The Zoning Resolution explicitly requires that the "**Board** determine[] that adequate buffering is or will be provided to mitigate such concerns as noise, visual, dust, or other social or environmental impacts." *Id.* (emphasis added). Not Staff. The Staff Report is but one piece of evidence the BOCC must consider when evaluating whether a special use permit satisfies Section 21 of the Zoning Resolution. *See* Section 2109.09, Ex 1 to Plaintiffs' Opening Brief, at Record 003592 ("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."). The Staff Report merely provides comments from Staff which, per the Zoning Resolution, cannot supplant the decision-making authority of the BOCC. *See* Section 2102, Ex 1 to Plaintiffs' Opening Brief, at Record 003574 ("A use by special review shall be approved only if the **Board of County Commissioners** finds that the proposed use . . .") (emphasis added). Further, given Staff did not review Plaintiffs' contradictory noise study or evidence produced after the Staff Report was published, little to no

credence should even be given to Staff's comments on noise impacts. Staff's analysis on whether there is adequate landscaping and screening of noise impacts is, at a minimum, incomplete.

In short, the Application does not comply with Subsection 307 (Minimum Setbacks) of Section 3 (A1 Agricultural One District) and Section 2107.14.3. The record reflects the Application does not include buffers/screening that will adequately mitigate concerns such as noise, visual, dust, or other social or environmental impacts to establish lesser setbacks per Section 2106.01. Thus, the BOCC's approval of the Application was a misapplication of the Zoning Resolution and not supported by competent evidence in the record.

D. The Application does not comply with Section 2102.09.

Notwithstanding the BOCC's and Applicants' arguments, the Application does not comply with Section 2102.09. Both the BOCC and Applicants argue that the record reflects the Board "weighed conflicting evidence and viewpoints" and concluded the Property would not exceed acceptable noise levels and was compliant with Section 2102.09. But, these arguments gloss over evidence in the record showing the Applicants' noise study does not comply with the Zoning Resolution, specifically Section 1705A.04, and the fact the record is devoid of evidence showing the BOCC actually "weighed conflicting evidence and viewpoints."

First, as explained in Plaintiffs' Opening Brief, Applicants' noise expert, Jeff 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. *See* Plaintiffs' Opening Brief, Section IV(B)(3). Based on an assumed 80 dB(A)⁵ at the Barn, Cerjan estimated the noise levels 25 feet from the

⁵ Cerjan's basis for the dB(A), however, was based on another project—not the present Barn or Property. Ex. 15 to Plaintiffs' Opening Brief, at Record 001106; Ex. 9 to Plaintiffs' Opening Brief, at p. 44, l. 7–12. Further, Cerjan's 80 dB(A) estimate assumes there is only a DJ playing music in the Barn and no other people. *Id.* Cerjan does not account

north, south, and east property lines to be below 35 dB(A) between 7 pm and 7 am. *See* Ex. 15 to Plaintiffs' Opening Brief, 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.⁶ Cerjan readily admitted "we don't have all the details figured out yet. This is more of a proof of concept." Ex. 9 to Plaintiffs' Opening Brief, at p. 45, l. 13–14. Approving the Application despite Cerjan's failure to consider factors required by Section 1705A.04, such as the effect (at property lines, not residences) of ambient noise created by the encompassing noise of the environment from all sources was a misapplication of the Zoning Resolution.

Second, the record does not reflect the BOCC "weighed" evidence; rather, it reflects the BOCC only considered Applicants' noise study. At the BOCC Hearing, Staff admitted it did not have sufficient time to fully review Plaintiffs' noise study. Ex. 9 to Plaintiffs' Opening Brief, at p. 11, l. 18–22. Despite Staff's admission, the BOCC moved forward with the BOCC Hearing and approved the Application without a full evaluation of Plaintiffs' noise study. *See id.* at p. 167, l. 13–23. The BOCC shall approve a special review only if the **BOCC** finds that the proposed use "[w]ill not cause significant air, water, or noise pollution," and the BOCC's "action shall be based on the evidence presented, compliance with the adopted County standards, regulations, policies, and other guidelines." Sections 2102.09 & 2109.09, Ex. 1 to Plaintiffs' Opening Brief, at Record

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.).

⁶ Cerjan expressly noted such factors would enhance sound propagation. *See* Ex. 15 to Plaintiffs' Opening Brief, 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.")

003574 & 003592. Failing to consider noise studies directly relevant to whether noise will exceed applicable noise levels of Section 2107.14.4 disregards Zoning Resolution text clearly requiring consideration of such findings. *See id.*

As previously noted, the Staff Report is but one piece of evidence the BOCC may consider when evaluating whether a special use permit satisfies Section 21 of the Zoning Resolution. *See id.* at Record 003592. The Staff Report, alone, cannot and does not represent the decision-making authority of the BOCC. *See id.* Nor should it when the Staff Report does not consider extremely pertinent evidence such as Plaintiffs' contradictory noise study.

As such, the Board's approval of the Application despite its lack of compliance with Section 1705A.04 and Section 2102.09 was a misapplication of the Zoning Resolution. Contrary to both the BOCC's and Applicants' arguments, the record does not reflect the BOCC "weighed" evidence—it reflects the BOCC's determination was biased and not supported by competent evidence in the record.

E. The Application does not comply with Sections 2102.04 or 2102.05.

Notwithstanding the BOCC's and Applicants' arguments set forth in their Answer Briefs, the Application does not comply with Sections 2102.04 or 2102.05. Regardless of whether the Master Plan is merely an "advisory document" the Application is not consistent with and does not comport with guidance set forth in the Master Plan. As set forth in Plaintiffs' Opening Brief—and supplemented herein—the record lacks competent evidence supporting the conclusion that the proposed uses and improvements of the Property are actually consistent with Objective 3-3B, Policy 3-3B.1, or Policy 3-3B.6 of the Master Plan. *See* Plaintiffs' Opening Brief, Section

IV(B)(4). To that end, and to conserve the Court's resources and time, Plaintiffs will not reiterate their Opening Brief arguments here.

III. CONCLUSION

The BOCC abused its discretion. The BOCC misapplied the Zoning Resolution when it did not require Applicants to satisfy each of the approval standards of Section 2102. There is simply no competent evidence in the record to support a finding that Applicants have, in fact, satisfied each of the approval standards of Section 2102. The Application should not have been approved.

Respectfully submitted this 3rd day of February, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 3, 2023, a true and correct copy of the foregoing was filed and served via the Integrated Colorado Courts E-filing System.

/s/ Lauren A. Taylor

Lauren A. Taylor