IN THE DISTRICT COURT, EAGLE COUNTY, COLORADO 0855 Chambers Road P.O. Box 597 Eagle, Colorado 81631 **PLAINTIFFS**: BARBARA AND JACK BENSON, CRAIG FOLEY, and GREG JOHNSON **DEFENDANTS**: EAGLE COUNTY, COLORADO, acting by and through its BOARD OF COUNTY COMMISSIONERS and BEHRINGER HARVARD CORDILLERA LLC Bryan R. Treu, Reg. No. 29577 Beth Oliver, Reg. No. 35575 Eagle County Attorneys' Office P.O. Box 850 Eagle, Colorado 81631 970.328.8685	DATE FILED: June 16, 2017 4:13 PM FILING ID: 72D7449C7D90F CASE NUMBER: 2016CV30361 •COURT USE ONLY• Case Number: 16 CV 30361 (Consolidated with Case No. 16 CV 30363) Division: 4

DEFENDANT EAGLE COUNTY, COLORADO'S AMENDED RULE 106 CONSOLIDATED ANSWER BRIEF

Defendant Eagle County, Colorado, acting by and through the Board of County Commissioners ("Board"), through undersigned counsel, submits this consolidated Answer Brief ("Brief") on the C.R.C.P. 106 claims of Plaintiffs Barbara and Jack Benson ("Bensons") and Plaintiffs Cordillera Property Owners Association, Inc. and Cordillera Metropolitan District ("Cordillera"). The Bensons and Cordillera are collectively referred to as "Plaintiffs."

A. FACTS AND PROCEDURE BELOW

This action relates to the Director's interpretation that the Proposed Use (defined below) of the Lodge Parcel and Village Center Parcel ("Property") for a clinic with multi-family residential use for addiction treatment would be a use-by-right under the Cordillera PUD Guide ("PUD"). R00233. Concerted Care Group, purchaser of the Property ("CCG"), proposes using the Property

for a clinic for non-critical, outpatient treatment of a variety of conditions including, but not limited to, eating disorders, alcoholism, chemical dependency, and behavioral health conditions with a focus on health and fitness, including fitness facilities, yoga, nutrition and recreation. ("Proposed Use"). R.0233; R.0009:*13-20*. The Director determined the Proposed Use is allowed under the PUD ("Director's Interpretation"). R.0233; R.0009: *21-25*; R.0010:*1-3*.[1]

Cordillera appealed the Director's Interpretation pursuant to Section 5-2400 of the Eagle County Land Use Regulations ("ECLURs"). R0258-270. The Bensons did not appeal the Director's Interpretation. The Board reviewed the Director's submissions (R.0233, R.0234, R.0236-257); Cordillera's submissions (R.0258-318, R.0319-320, R.0321-730, R0731-765); CCG and Defendant Intervenor Behringer Harvard Cordillera, LLC's ("Behringer") submissions (R.0766-784, R.0785-810, R.0811-854), over 120 letters and emails from Cordillera community members (R.0860-1160), and held a public hearing on September 20, 2016. (R.0001-231). The Board affirmed the Director's Interpretation with a modification precluding inpatient treatment in the clinic component of the Property. R.0855-859. The Board reviewed over 500 pages of submittals and heard over 4.5 hours of testimony with deliberation prior to rendering its decision, together which comprises the "Record" here.

On November 8, 2016, Cordillera filed a complaint under C.R.C.P. 106. Although the Bensons had not appealed the Director's Interpretation, they filed a complaint under C.R.C.P. 106 and C.R.C.P. 57(a). Plaintiffs seek review from this Court, arguing clear uses-by-right on private property should be subordinated to the more generalized, amorphous "resort residential community" concept, which they claim would not allow CCG's Proposed Use. Neither the

[1] The Director originally issued a determination letter on June 1, 2016, but reissued the same interpretation on July 11, 2016 to correct a potential procedural error. R.0010: *4-11*.

Board nor this Court can enforce this baseless concept and are both legally mandated to uphold the clear uses-by-right on the Lodge Parcel.

B. STANDARD OF REVIEW

Review of quasi-judicial tribunals under C.R.C.P. 106(a)(4) is "limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before" the tribunal. In determining whether there was an abuse of discretion, courts may consider whether there was a misinterpretation or misapplication of governing law. *Sierra Club v. Billingsley*, 166 P.3d 309, 311–12 (Colo. App. 2007)(citations omitted). Colorado Courts interpret local zoning regulations as follows:

> [Z]oning ordinances are subject to the general canons of statutory interpretation. When construing a statute or ordinance, courts must ascertain and give effect to the intent of the legislative body. Moreover, courts must refrain from rendering judgments that are inconsistent with that intent. **To determine legislative intent, we therefore look first to the plain language of the ordinance. If courts can give effect to the ordinary meaning of words used by the legislature, the ordinance should be construed as written, being mindful of the principle that courts presume that the legislative body meant what it clearly said…** If the language of an administrative rule is ambiguous or unclear, **we give great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record.** (emphasis added).

Id. (citing City of Colo. Springs v. SecureCare, 10 P.3d 1244, 48-49 (Colo.2000). There is a strong presumption of validity accorded to the Board's interpretation of its own zoning regulations, and the burden is squarely on the party challenging the determination to overcome that presumption. *Quaker Court LLC v. Bd. of County Commr's*, 109 P.3d 1027, 1030 (Colo. App. 2004). Where the Board's interpretation is consistent with generally applied rules of statutory construction, the administrative interpretation is entitled to deference. *Rivera–Bottzeck v. Ortiz*, 134 P.3d 517, 521 (Colo. App. 2006). Even when zoning provisions are susceptible of more than one reasonable interpretation, the Court should defer to the Board's reasonable

interpretation. *Sheep Mountain Alliance v. Bd. of Cty. Comm'rs, Montrose Cty*, 271 P.3d 597, 601 (Colo. App. 2011); *Fire House Car Wash, Inc. v. Bd. of Adjustment for Zoning Appeals*, 30 P.3d 762, 766 (Colo.App.2001).

A district court cannot consider whether a lower tribunal's findings are right or wrong, substitute its judgment for that of the tribunal, or interfere in any manner with the tribunal's findings if there is any competent evidence to support the findings. *Bd. of Cty Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). An order of the Board is presumed reasonable, and evidence must be reviewed by the Court in a light most favorable to the Board's findings. *Lieb v. Trimble*, 183 P.3d 702, 704 (Colo.App.2008). All reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the Board. *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo.1990); *Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo.App.2002).

C. ARGUMENT IN RESPONSE TO CORDILLERA BRIEF

1. The Board did NOT Abuse its Discretion when it Interpreted the Proposed Use to be a Use-by-Right Under the Plain, Unambiguous Language of the PUD.

Cordillera argues the Board misinterpreted the PUD when it concluded CCG's Proposed Use is a use-by-right for the Lodge Parcel. This argument is wrong on several levels. First, Cordillera engages in semantics to characterize CCG's Proposed Use as an "addiction treatment center" and "residential rehabilitation facility." Cordillera then argues that because its characterization of the Proposed Use is not specifically delineated in the list of uses-by-right for the Property – it must not be allowed. Cordillera's argument is misleading. Substantial and credible evidence in the Record supports the Board's finding concerning CCG's Proposed Use.

Imperative to this analysis is the appropriate description for CCG's Proposed Use. The Board was asked whether a *clinic that will provide outpatient, non-critical care for the treatment of a variety of addiction conditions* is a use-by-right under the PUD. R.0009; R.0312. The Board

upheld the Director's Interpretation that the Proposed Use, with a separate clinic portion and a separate residential component, is a use-by-right under the PUD, with the modification that the clinic portion must be limited as an outpatient, rather than inpatient facility. R.0855-859.

Cordillera's more sweeping characterization of the "use" as "an addiction treatment center" and "residential rehabilitation facility" is intentionally misleading. Indeed, the record is replete with attempts by Cordillera to misconstrue the Proposed Use as a "hospital" or "group home" (R.0030-33; 0048; 0054; 0056; 0678-9)(argument further advanced in Cordillera's Brief, p. 8), all of which are in direct conflict with the testimony of CCG (the entity seeking interpretation and explaining the proposed operation) as to the actual Proposed Use, and is contrary to the Board's ultimate finding of fact on the issue. Similarly, Cordillera's strained argument that the Proposed Use is not limited to providing "non-critical care" is also in direct conflict with credible and competent testimony and evidence in the record, upon which the Board relied.

The Board was not persuaded by these attempts to mischaracterize the Proposed Use. Rather, the Board found the following testimony by County Staff and CCG representatives about the Proposed Use more credible and persuasive than evidence presented by the Plaintiffs:

Clinic versus Hospital:

- Testimony of the Director: "This was not presented as an arrangement where patients are staying overnight in hospital type rooms." R.0015.
- Testimony of CCG Representative: "You can see the defined areas of residential and the defined area of the clinic. . . the clinic portion . . .will include . . .examination rooms, doctors' offices, administrative offices and storage , as well as individual and group counseling rooms for talk therapy. The residential portions of the property would include units that are identical to the hotel rooms now . . . ." R. 0081-82. "[T]here is a separate clinic portion. There's a separate residential portion" R.0108. "The clinic operations would be the same as a typical doctor's office, you know, nine to five-type hours." R.0109. "All the treatment takes place in the clinic . . . no treatment is taking place in a residential unit or room." R.0114. "There's clearly differentiated portions of this facility. There's residential portion. And there is a clinic portion where that anything medical – any of the therapeutic care will take place there, not in their residence." R.0178.

- Testimony of counsel for CCG: "CCG seeks to operate a clinic - not a hospital - in a residential treatment facility." R.0091.

Critical Care versus Non-Critical Care

- Testimony of the Director: "No critical care treatment was proposed. CCG has since provided applications for licensing they're seeking as evidence that no proposed treatment would fall into the generally-accepted definition of critical care." R0014.
- Testimony of CCG's Medical Director: "Contrary to the belief of Dr. Lawrence Brooks, who submitted an affidavit on behalf of those in opposition to the Lodge, we will not be providing critical care. Critical care is defined as the specialized treatment and continuous monitoring of patients with specialized treatments and continuous monitoring of patients with life-threatening failure of several organs or body systems. This is not an adequate characterization of the patients we will serve at the Lodge. Residential treatment is low-intensity clinically monitored service for stable patients that is designed to allow respite from the environment in which their disease is most active." R.0083-84.

Based on this evidence presented in the hearing, the Board made the following, express, finding of fact: **That, the proposed use is for addiction patients to stay in lodging rooms and receive outpatient clinical treatment in addition to other therapeutic amenities such as yoga, classes, spa treatments, etc. . . . The Board does not find the proposed use to be a hospital, group home or Acute Treatment Unit as argued by Cordillera.** R.0856.

Cordillera is asking this Court to either overturn the Board's factual finding (supported by substantial, competent evidence on the record) or substitute its judgment for that of the Board, an action clearly precluded by Colorado courts. *O'Dell*, 920 P.2d at 50; *Marker v. City of Colorado Springs*, 336 P.2d 305, 307 (Colo. 1959).

Second, and more importantly, CCG's Proposed Use clearly meets the plain language definition of any one of several uses-by-right allowed on the Property. Section 2.01.1 of the PUD lists 34 standalone uses for the Lodge Parcel and Section 3.01.1 lists the same 34 uses for the Village Center Parcel. R.0357-358; R.0363-364. Both Sections expressly permit, among others, the following uses:

- Clubhouse and Lodge building or buildings with related facilities.
- Meeting rooms.

- Lodge and conference facility including hotel uses, lodge suites, food service facilities, laundry and cleaning facilities, reception desk and lobby along with related facilities.
- Service commercial.
- Medical offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, **without limitation**, for outpatient plastic surgery and other cosmetic procedures.
- Professional Offices.
- Lodging and Accommodations.
- Residential – Single-family; residential – townhome; residential - multi-family; residential – condominium and/or fractional interest ownership.
- Educational facilities. *Id.*

To determine legislative intent, we look first to the plain language of the statute.

See Vaughan v. McMinn, 945 P.2d 404, 408 (Colo.1997); *Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 590 (Colo.1997). Words are to be given their ordinary and generally accepted meanings. *Jones,* 204 P.2d at 564; *see also State v. Neito,* 993 P.2d 493,500 (Colo. 2000)("it is presumed that the General Assembly meant what it clearly said.").

The analysis is not complicated. As was determined by the Board, an outpatient clinic for non-critical care and residential uses as proposed by CCG are allowed uses-by-right by the clear and unambiguous language of the PUD. R.0013:*2-9*; R.0013:*19-21*. The Proposed Use meets the plain language definition of "clinic." The Record contains many examples of the ordinary and generally accepted meaning of the word "clinic": a clinic is for outpatient non-ambulatory care (R:0015); clinic is a place in which outpatients are given medical treatment or advice (R.0132:*1-2*); a much broader definition includes a group of similar treating professionals working together (*Id*).; the ordinary plain language definition as set forth in the Merriam-Webster dictionary describes a clinic as a facility for the diagnosis and treatment of outpatients (R.0131) and a facility that offers professional services or consultations (R.0142) . Cordillera disingenuously argues CCG's Proposed Use does not meet the definition of "clinic" under the

ECLUR; however, the ECLUR does not contain a definition for "clinic"[2] and the Board was entitled to rely upon the plain language definition of the word. Based on this evidence presented at the hearing, the Board reasonably determined that CCG's Proposed Use clearly fit within the generally accepted definition of "clinic". R.0856.

The Proposed Use also meets the plain language definition of "outpatient care." The Board heard evidence that all of the treatment associated with the Proposed Use will take place in the clinic setting. R.0114:*16-25*; R.0178:*7-11*. No treatment will occur in a residential unit or a room. R.0114. This manner of treatment is consistent with the type of outpatient service associated with the ordinary definition of a "clinic", described above. Based on this evidence, the Board reasonably determined that CCG's Proposed Use is for patients to "stay in lodging rooms and receive outpatient clinical treatment…" R.0856. Cordillera attempts to discredit this finding by arguing that if patients are staying in a facility to receive treatment, the treatment is somehow inpatient treatment. This argument ignores the factual reality established on the Record that the two uses will be distinguishable from one another, although located on the same property.

The Proposed Use also meets the plain language definition of "non-critical" care. No critical care treatment was proposed in connection with the Proposed Use. R.014:*4-7*; R.0083:*16-21*. The term "critical care" is generally understood to include hospital treatments of acute conditions and monitoring as required to avoid imminent bodily injury or death. R.0787. A widely recognized synonym of "critical care" is "intensive care." *Id*. As noted above, the Proposed Use will be a clinic and residential facility for the treatment of eating disorders,

[2] Based solely on an affidavit, Cordillera argues CCG's Proposed Use does not meet the definition of "clinic" under State law, asserting the Use is similar to a psychiatric hospital. However, this argument misconstrues CCG's Proposed Use and is inconsistent with the County's factual finding that CCG's Proposed Use is not a hospital.

alcoholism, chemical dependency, and behavior health conditions. Treatments proposed to be administered at the clinic include therapeutic group and individual activities, health and wellness classes, recreational activities, and some minor medical attention, including routine administration of prescriptions and follow-up visits with medical personnel. *Id.* Nothing in the applications for licensing submitted by CCG would indicate that any of the treatment offered by CCG would fall into the generally accepted definition of critical care. R.0014:*4-7* [3] Based on this evidence, the Board reasonably determined that "critical care will not be an offering at the proposed clinic." R.0856.

The residential component of CCG's Proposed Use is also allowed by the plain language of the PUD. A myriad of residential uses are listed as uses-by-right: the Lodge; lodging and accommodations; and as well as various general residential uses, from single-family to multi-family residential. R.0358. Cordillera asserts that the Board misconstrued CCG's Proposed Use by treating the proposed clinic and the residential facility as separate and distinct uses, arguing CCG's Proposed Use was instead for a single facility. However, nothing in the plain language of the PUD prevents the operation of several distinct uses by a property owner, such as the operation of a clinic with a separate residential component. As explained above in connection with the argument that the Proposed Use is not a hospital, the Board found the Proposed Use will in fact involve separate facilities with separate functions.

Finally, the PUD does not limit the treatment offered by "clinic and outpatient facilities for non-critical care" to a particular type or purpose nor does it exclude any type of treatment. In fact, the authorized use of a clinic for non-critical medical care is "*without limitation*" and could thus encompass a wide range of care or treatment. R.00358. Another canon of statutory

[3] *See* R.0795-0802 (CO-Substance Use Disorder License Applications of CCG).

construction is that all words and phrases in a statute, law, ordinance, or other legal document should be given effect and purpose. *TRW, Inc. v. Andrews,* 534 U.S. 19, 31 (2001). A reviewing court will avoid any interpretation that renders a portion of a statute redundant, unnecessary or superfluous. *Id.* Accordingly, the idea that a clinic must be limited to cosmetic care only, as Cordillera argues, is expressly contradicted by the plain language, "including, without limitation…" R.0093:*2-6.* Cordillera's paradoxical argument is at odds with the very purpose of zoning, which is to identify categories of land uses that are permitted or prohibited. Land use categories come in different detail classifications. Cordillera argues that only a narrow category of uses is permitted, a notion belied by the inclusion of the "without limitation" language.

The evidence in the Record clearly demonstrates that CCG's Proposed Use is "limited to clinic and outpatient facilities for non-critical care" and therefore is a "Medical office/Facility" allowed as a use-by-right on the Property. Accordingly, the Board's determination that the Proposed Use is allowed under the PUD was not a "shot gun" approach, but rather was reasonable and consistent with the rules of statutory construction. R.0856-857. The Board's determination is therefore entitled to deference and should not be overturned. *Rivera–Bottzeck*, 134 P.3d at 521; *Sheep Mountain Alliance,* 271 P.3d at 601. To hold otherwise, would deny a use permitted within the familiar and popular understanding of the words used. *Jones v. Board of Adjustment*, 204 P.2d 560, 564 (Colo. 1949). The reasonableness of the Board's determination is further supported by *Wilner v. Behringer Harvard*, (U.S. D. Colo.)(Slip Copy)(2017 WL 815231)("[T]he proposed amendments listed 33 new standalone uses that would be authorized for the Lodge Parcel, including such things as retail, commercial, professional offices, and

residential uses…One authorized new use was for non-critical medical care 'including, **without limitation**, for outpatient plastic surgery and other cosmetic procedures.'"(emphasis added)).[4]

2. The Board did NOT Abuse its Discretion when it Determined the General Purpose and Intent language of the PUD did not Preclude a Private Property Owner from Exercising Clear Uses-by-right.

Cordillera claims the general purpose statement of the PUD requires that the Lodge amenities remain accessible to and open for use by the Cordillera community. The general purpose statement in the PUD applies to the entire 7000-acre Cordillera community. This statement indicates Cordillera is to be developed as a "resort residential community." R.0347. Cordillera then makes the leap that this language somehow trumps or qualifies the clear uses-by-right of the Lodge Parcel and that any use that will "distance"[5] the Lodge from the rest of the Cordillera community is not allowed. This argument is unpersuasive for several reasons.

First, it is a general rule in construing statutes that the specific governs the general. *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 384–85 (1992). A specific statute should not be deemed to be controlled or nullified by a general statute absent definite contrary intention. *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir.1993). Here, the PUD contains 34 standalone uses-by-right for the Lodge Parcel, many of which would preclude general community access. The Lodge can be used for such private things as offices, commercial space, residential uses, employee housing, educational facilities, day care facilities, and clinics. R.0357-358; R.0363-364. As a matter of statutory construction, these specific, authorized uses cannot be

[4] In the *Wilner* case, plaintiffs sought judicial declaration that the Lodge must remain accessible to the plaintiffs, that the Lodge could not be eliminated and replaced by any of the 33 proposed new uses for the Lodge parcel, and that any elimination of the Lodge would require approval by the CPOA.

[5] It is important to note that the PUD says nothing about "distancing" the Lodge from the community. That was an argument manufactured by Cordillera in the appeal.

eliminated or otherwise qualified based on general purpose and intent statements found elsewhere in the PUD.

Second, the "resort residential community" purpose language referenced by Cordillera applies to all of the 7000-acre community of Cordillera. If resort residential community somehow mandated general community access, it would apply equally to all residential properties. Why would the residential uses authorized at the Lodge be any less private than any other dwelling in Cordillera? Such a nonsensical interpretation should not be made. *See Hall v. Walter*, 969 P.2d 224, 229 (Colo.1998).

Third, there is no language in the PUD or elsewhere that would require some level of community access in addition to the other private uses allowed. The role of zoning is to determine allowed uses, not mandate preferred uses. *Sherman v. Colo. Springs Planning Comm.*, 763 P.2d 292 (Colo.1988) (holding it was an abuse of discretion to deny or otherwise limit a use by right without clear, adequate standards); *see also Securecare*, 10 P.3d at 1251 ("[w]ithout the proper standards or criteria, a court will not interpret the zoning provisions as granting such authority [to deny a permitted use]"). The Board heard testimony that no standards or criteria exist to limit uses-by-right. R.0018. How then do we determine what uses-by-right may be too "distant" from the community? Do a certain number of rooms have to be open to the community? If so, how many? Is it the restaurant? The pool? The bar? The record contained ample evidence that there are no criteria for the Board to make these determinations. *Id.*

Fourth, even if a "resort residential" component is required, the Proposed Use satisfies such a requirement. Indeed, just as the current residents of Cordillera retreat to the community for its resort environment, the Lodge will be providing a place in a relaxing resort environment

for people recovering from addiction. R.0769. The Lodge will still be operated as a resort residential use, only those allowed to use the Lodge will change.

The Board determined the clear and specific uses-by-right control over the generalized purpose statements in the PUD. R .0857 ("This general language does not trump the clear uses-by-right for the Lodge Parcel"). Such determination is reasonable and should not be overturned. *Platte River Cons. Org. v. Nat'l Hog Farms*, 804 P.2d 290, 292 (Colo.App. 1990).

3. The Board did NOT Abuse its Discretion or Exceed its Jurisdiction by Failing to Apply the Conditions of Approval of the 2009 PUD Amendment

Cordillera next contends that the Board's interpretation of the PUD failed to abide by the conditions of approval for the 2009 PUD Amendment. Cordillera asserts that the uses-by-right approved in 2009 are now somehow new uses, and therefore, not allowed. Cordillera's claim is a wrong for several reasons.

First, neither the Board nor this Court can render an interpretation that is nonsensical. *See Hall v. Walter*, 969 P.2d at 229 (statutory construction which leads to absurd results will not be followed). Cordillera points to the 2009 PUD Amendment application that states: "[t]he Amendment does not introduce new or additional density or uses to the Existing PUD…" R.0627-629. However, Cordillera fails to point out to this Court that "Existing PUD" was defined as the entire 7000-acre Cordillera development; a development that allowed a broad array of commercial uses. Although no new densities and uses were added to the entire Cordillera PUD, several *were* moved to the Lodge Parcel including "Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care…" Clearly, Cordillera felt uses such as medical offices and clinics were previously allowed throughout the PUD or they would not have agreed to their inclusion as a use-by-right on the Lodge Parcel in 2009. It is disingenuous to now argue differently.

These 34 standalone uses are far from new; rather they were adopted through a public process, reviewed and approved by Cordillera, which put all property owners on constructive notice that ANY of the 34 uses could be exercised as a use-by-right at ANY time. *See South Creek Assocs. V. Bixby & Assocs., Inc.*, 781 P.2d 1027, 1033-34 (Colo.1989) (property owner is deemed to have constructive notice of zoning provisions applicable to his property). As this Court held in its May 26, 2017 Order on the Behringer Motion to Dismiss ("Order re: Motion to Dismiss"), "[p]laintiffs, as property owners, are charged with the knowledge of the contents of the zoning provision at the time it was passed and when it is recorded…"

Second, the Board chose not to impose conditions on the uses-by-right approved as part of the 2009 PUD Amendment. Consequently, once a use-by-right satisfied the criteria required for approval under the PUD Amendment, the Board and this Court lost the ability to restrict its operation. *See Securcare*, 10 P.3d at 1251 (uses-by-right may only be qualified when their land use codes provide further detailed, adequate standards of review). Other than limiting the clinic to non-critical care, there are no standards for what type of clinic can be operated, what type of lodge can be operated, what type of medical office can be operated, etc. Accordingly, neither the Board nor this Court can require a certain *type* of clinic or lodge. The fact that the Proposed Use may now cater to a new type of person than historically used the Lodge does not make the uses new. Since 2009, the uses have clearly been allowed on the Lodge Parcel.

Third, what Cordillera characterizes as conditions of approval ("will not have any effect on adjacent properties" and "will not confer a special benefit upon any particular person") were actually approval criteria considered when the PUD Amendment was approved in 2009.[6] The 34

[6] The ECLUR required that the PUD Amendment satisfy five approval criteria when it was approved in 2009, including "[t]he PUD Amendment does not affect, in a substantially adverse manner, either the enjoyment of land abutting upon or across a street from the Planned Unit

uses-by-right were found to have met those approval criteria and the time to challenge that decision has long since passed.[7] Additionally, as a matter of law, operating a previously approved use-by-right cannot affect adjacent properties in a negative way. *See Western Paving Constr. Co. v. Board of County Comm'rs*, 506 P.2d 1230 (Colo.1973)(the designation of a permitted use in a particular zone affirmatively resolved the issue of whether the use is in harmony with the surrounding neighborhood.) Exercising an approved use-by-right cannot affect adjacent properties any more than it can be found inharmonious with the neighborhood.

Similarly, exercising a previously approved use-by-right cannot be viewed as conferring any type of special benefit upon an owner. Cordillera is under the mistaken belief that uses-by-right on the Lodge Parcel must somehow be operated in a manner that directly benefits them in addition to the Lodge owner. Clearly, providing flexibility in the development of the Lodge Parcel, maintaining the solvency of the Cordillera Metropolitan District, and ensuring the Lodge not fall into disrepair were benefits to the entire Cordillera Community. Cordillera is disregarding those benefits in a contorted attempt to use this Court to extract a public benefit from private property owner. A reviewing court should tread lightly upon the complaint of persons seeking to benefit their own property by imposing restrictions on another's use of his property. *Shumate v. Zimmerman*, 444 P.2d 872, 874 (Colo. 1968); *see also Keifer v. Luhnow*, 491 P.2d 100 (Colo.App.1971) (zoning ordinances to be construed in favor of right of property owner to an unobstructed use of his property).

Development or the public interest," and "[t]he PUD Amendment is not granted solely to confer a special benefit upon any person." ECLUR § 5-240.F.3.m.

[7] Any challenge to the BOCC's conclusion that the PUD Amendment satisfied the approval criteria was required to have been brought within 28 days of the BOCC's decision on the amendment pursuant to Rule 106(b). *Maslak v. Vail*, 345 P.3d 972, 976 (Colo. App. 2015).

4. The Board did NOT Abuse its Discretion or Exceed its Jurisdiction Because it Gave Effect to the Legislative Intent of the Operative Provision of the 2009 PUD Amendment.

Cordillera argues the Board abused its discretion by determining the PUD was ambiguous but failed to give effect to the legislative intent of the "operative provision" of the 2009 PUD Amendment. *See* Cordillera Brief at pg. 13. The operative provision according to Cordillera is the phrase "limited to clinic and outpatient facilities for non-critical care". *Id.* In support of its argument, Cordillera takes out of context comments made by two County Commissioners during the September 2016 hearing on the Cordillera appeal. However, the Board did not make a finding that any of the language in Sections 2.01.1 or 3.01.2 of the PUD was ambiguous. In addition, even assuming the language is ambiguous, the Board did, in fact, consider over four hours of testimony, much of which focused on the legislative intent of the PUD. In doing so, the Board examined the language Cordillera requested and approved during its review of the 2009 PUD Amendment and the intent that was expressed clearly and unambiguously by that language.

Prior to the 2009 PUD Amendment, the former uses-by-right for the Lodge Parcel listed the "Clubhouse and Lodge building or buildings with related facilities *including but not limited to the following* (emphasis added) (nine other allowed uses):" R.0441. Identifying these additional uses in an illustrative list of related facilities made them ancillary to Lodge purposes.

During review of the proposed language for the 2009 PUD Amendment, the qualifying phrase "including but not limited to the following:" was *purposefully deleted* from the PUD. The removal of this language was supported and approved by Cordillera. Accordingly, in reviewing the plain language of the PUD, the Board concluded the 34 current uses-by-right are now standalone uses not dependent on or ancillary to the continuation of the current Lodge operations. A rule of statutory construction is that the legislature is presumed to act intentionally and purposefully when it includes language in one section but omits it in another. *See Romer v.*

Bd. of County Comm'rs of County of Pueblo, 956 P.2d 566, 567 (Colo.1998) (absence of specific language in a statute "is not an error or omission, but a statement of legislative intent"); *see also Wilner v. Behringer Harvard*, (U.S. D. Colo.)(Slip Copy)(2017 WL 815231)(the amendments delated the "including but not limited to" thus evidencing an intent to add new uses).

Added as part of the 2009 PUD Amendment was the phrase Cordillera now claims is ambiguous – "limited to clinic and outpatient facilities for non-critical care, including, *without limitation,* for outpatient plastic surgery and other cosmetic procedures." The 2003 version of the PUD allowed professional offices on the Village Center Parcel. R.0091. Under the County's ECLUR, "office" is defined to include "professional offices including physician's offices." R.0091. At the hearing before the Board, a representative of Behringer during the 2009 PUD Amendment process stated that "[w]hat we had in mind was a Betty Ford clinic….we thought treatment like that would be a possibility." R.0104:*4-12*. Although Behringer believed this use to be a professional office as was allowed under the 2003 version of the PUD, it added "Medical Offices/Facilities" to the initial draft of the 2009 PUD Amendment to specifically call out the use. *Id.* In response, Cordillera required Behringer to *add* the language "limited to clinic and outpatient facilities for non-critical care, including, *without limitation.*…" R.0091; R.0613 ("Staff and legal feel this definition is acceptable"). With the addition of that language, Cordillera approved the PUD Amendment.

Cordillera argues the purpose of this additional language was to "limit" the "Medical Offices/Facilities" use to medi-spa type services that were ancillary to a Lodge and open to the general community. *See* Cordillera Brief at pp. 14-15. This argument makes little sense in light of the addition of the phrase "without limitation" which means there is **no** limit. Had Cordillera really intended to limit the type of clinic or restrict the use to "medi-spas" it could have easily

done so. It did not. As set forth above, in addition to approving the addition of this expansive language to the clinic use, Cordillera also approved the removal of the "including but not limited to the following" language that could have arguably tied a clinic to Lodge activities. These modifications are a clear statement of intent of the Parties to create standalone uses-by-right and Cordillera cannot now feign confusion or ignorance of the intentional change in the meaning of the operative language. *See Romer,* 956 P.2d at 567*; People v. Browning,* 809 P.2d at 1090.

Accordingly, the Board did consider the intent through examination of the plain meaning of the language deleted from and added to the 2009 PUD Amendment. R.0182:16-22 ("I think we have to assume that that is the legislative intent, is those 34 uses that are in the 2009 [PUD Amendment]"); R.0186:1-8 ("[w]hat we're stuck with is the actual words that got written down, the words that were changed in the PUD Guide that the…Property Owners Association approved….and that in these 34 uses by right, this [P]roposed [U]se is one of them"). The Board's interpretation of the language in the PUD was reasonable and consistent with generally applied rules of statutory construction, and the Court should defer to their interpretation. *Rivera–Bottzeck, 134 P.3d at 521*; *Sheep Mountain,* 271 P.3d at 601.

Finally, although the legislative intent of the 2009 PUD Amendment is evidenced in the plain language of the PUD, Cordillera asks this Court to go outside of the unambiguous language and look to other extrinsic evidence. Even assuming Cordillera is correct, the extrinsic evidence further demonstrates that the Lodge was never intended to be a public amenity open to the Cordillera community. The Declaration of Protective Covenants, Conditions and Restrictions for Cordillera that pre-existed the 2009 PUD Amendment ("Declaration") are the strongest indicator of this intent. R.0806-0807. The Declaration demonstrates Cordillera never had the authority to mandate community access to the Lodge in the first place. The Declaration defines Public

Amenities to include the Lodge and state "**no Person gains any right to enter or to use those facilities by virtue of membership in the Association or ownership or occupancy of a Unit**…[Private Amenities] owners shall have the right, from time to time **in their sole and absolute discretion** and without notice, to amend or waive the terms and conditions of use of their respective Private Amenities **and to terminate use rights altogether**." R.0807.

5. The Board did NOT Exceed its Jurisdiction by Rejecting the Need for yet Another PUD Amendment.

Cordillera claims the Proposed Use required an amendment to the PUD and that such amendment cannot be made until after Cordillera approval. A PUD Amendment is required when there is a major modification that alters the character or land use of a portion of the project.[8] R.0011. Cordillera's circular argument assumes the Proposed Use is not currently a use-by-right. The Board disagrees for a number of reasons.

First, a PUD does not need to be amended when an identified use-by-right is exercised. Lodge, clinic, and residential uses have previously been approved on the Lodge Parcel. Accordingly, operating as such cannot alter the character or land use of Cordillera. To hold otherwise would say that exercising any previously approved use-by-right, but for the current use, triggers a process where Cordillera has veto power. Such a finding would render the listed uses-by-right meaningless. *See Colorado Dep't of Soc. Servs. v. Board of County Comm'rs*, 697 P.2d at 23 (a regulation must be interpreted to give effect to all its parts).

Second, it would be illogical to require the Board to review and approve a PUD amendment today for a use-by-right approved in 2009 using the exact same standards it used to

[8] Examples in the PUD of items requiring major modification are: any changes from residential to commercial, changes in designation of open space or wildlife areas to a non-recreational or non-conservation related use, and additions of land to be governed by the PUD other than recreational, open space or access land. R.0022.

approve the use-by-right in the first place. What would the Board be amending? We would be adding a use-by-right that already exists. Again, such a nonsensical interpretation must be rejected. *See Hall v. Walter*, 969 P.2d at 229; *see also* §2-4-201(1)(c).

Third, Cordillera's argument would make clear uses-by-right somehow conditional. Cordillera would have this Court rule that approved uses under the PUD do not establish an absolute right to development by a private property owner, but instead some limitations on permitted uses must be implied based on nebulous concepts of "resort residential community," "social gathering place," or "centerpiece." Such a ruling would be in direct conflict with controlling Colorado case law. *See Securecare*, 10 P.3d at 1251 (uses-by-right may only be qualified when land use codes provide further detailed, adequate standards of review); *Western Paving*,506 P.2d at 1232 (abuse of power for Boulder County to reserve the rights to impose further conditions on a use-by-right unrelated to health and safety reasons). Therefore, neither the Board nor this Court can deny this lawful use under the auspices of a PUD Amendment that gives the HOA veto power. *See Conder*, 927 P.2d at 1352 (landowner must be entitled to make use of the land in a manner consistent with the zoning).

D. ARGUMENT IN RESPONSE TO BENSON BRIEF

1. The 2009 Notice Describing the Purpose and Effect of the 2009 PUD Amendment was NOT an Issue Properly on Appeal before this Court and Fails Even if Considered by the Court

The Bensons contend that the Board's decision should be overturned based on alleged defects in a 2009 notice. The Board disagrees for several reasons.

First, this matter was not an issue in the Cordillera appeal before the Board and, therefore, not an issue properly on appeal before this Court. In its Order re: Motion to Dismiss, this Court found the Bensons were not required to exhaust administrative remedies before filing

their 106 claims, stating that any attempt to require the Bensons to appeal again would be futile. *See* Order re: Motion to Dismiss at pgs. 6-7. However, in both the Benson Brief and the Benson Sur-reply to the Motion to Dismiss, the Bensons mischaracterized the facts, leading this Court to believe the Plaintiffs had no opportunity to present evidence on the intent of the 2009 PUD Amendment or to raise the issue of the 2009 notice before the Board[9]. This is simply not the case. CCG submitted its response to the Cordillera appeal to the Board, with a courtesy copy to Cordillera, on September 12, 2016. R.0785. The hearing on the Cordillera appeal was held on September 20, 2016. Had the Bensons or Cordillera wanted to provide additional evidence or raise the 2009 notice issue in response to CCG's September 12, 2016 position statement, they could have done so at the hearing during the presentation of argument or the period set aside for rebuttal arguments. R.0097. More importantly, the Plaintiffs had ample opportunity to present evidence as to the intent of the 2009 Amendment and the language identifying the 34 standalone uses permitted on the Lodge Parcel and, in fact, did so in great detail at the hearing. R.0017:*10-25*; R.0030:*7-13*; R.0034:*4-14;* R.0046:*9-24*; R.0059:*1-16*; R.0061-62; R.0067:*20-25*; R.0091; R.0094:*20-25*; R.0095:*1-2*; *see also* Section C.4 herein (pp. 16-20). At no time were the Plaintiffs precluded from raising the 2009 notice issue as the Bensons claim. In addition, the October 2016 email referenced in the Benson Brief was sent in response to an email from the County Attorney providing a copy of the proposed findings of the Board for comment. Such email was sent as a professional courtesy to counsel after the *close* of the hearing. The Board did not respond to Cordillera's request to present additional evidence as to the intent of the 2009 PUD Amendment because Cordillera had already presented detailed evidence on the intent at the hearing; a hearing that had been concluded.

[9] The Bensons claim the "notice sent by the BOCC is the official indication of [the] intent" of the 2009 PUD Amendment. *See* Benson Sur-reply at pg. 3.

Had the Court been provided with an accurate account of the proceedings, the Board believes the Court would have found the Bensons had not exhausted the administrative remedies that were available to them regarding the issue of the 2009 notice. Failure of a party to exhaust administrative remedies deprives a district court of the jurisdiction to hear that party's action. *Golden's Concrete*, 962 P.2d at 923; *Egle v. City and Cty. of Denver*, 93 P.3d 609, 612 (Colo.App. 2005). No situation is more fitting for administrative review and remediation than a claim that the Board failed to follow notice requirements set forth in land use regulations drafted and adopted by the Board. Clearly the Board has authority in this matter and could have addressed the claim had the matter been properly appealed. Accordingly, the Bensons are now barred from raising this issue. *See Board of County Comm'rs v. Moga*, 947 P.2d 1385, 1391 (Colo. 1997) (challenge to a zoning variance was barred as administrative remedies must be followed when the matter complained of is within jurisdiction of the administrative authority).

Second, the Bensons' dereliction in raising the 2009 notice issue led to a complete failure to create a record for review. Court review under C.R.C.P. 106(a)(4) is limited to a determination of "whether the body or officer has exceeded its jurisdiction or abused its discretion, **based on the evidence in the record** before the defendant body or officer." (emphasis added). It is axiomatic that when challenging a record of decision, a plaintiff must first have created a record for review. *See Anderson v. Colorado*, 756 P.2d 969, 978 (Colo.1988). The Bensons have made no citation to the record with regard to the notice issue because there is nothing in the record to cite. This failure is fatal to their claim. The judgment of the trial court is presumed to be correct, and it is the appellant's duty to provide a complete record from which the reviewing court can determine whether error occurred. *In Re Interest of D.R. V.*, 885 P.2d 351, 355 (Colo.App.1994)(a reviewing court will not address constitutional and statutory rights

violation claims that were not included as part of record or raised below). A party who proceeds to seek review of an agency decision without a proper record after the case is filed does so at his peril. *Colorado Nat. Bank v. Zerobnick & Sander, P.C.,* 768 P.2d 1276, 1277 (Colo.App.1989) (a party cannot overcome deficiencies in the record by statements in a brief).

The Bensons cannot benefit from their failure. *Hock v. New York Life Insurance Co.,* 876 P.2d 1242, 1252 (Colo. 1994) (moving party will not be permitted to take advantage of his own failure to designate pertinent portions of the transcript as part of the record); *see also Scott v. Hern,* 216 F.3d 897, 912 (10th Cir.20) (an appellate court must affirm if record is inadequate).

Third, even if the Court entertains this claim without the benefit of an adequate record, it still fails for the same reasons set forth in the Board's response to Cordillera's claims in Section C.3 above. The 2009 Amendment resulted in 34 standalone uses-by-right on the Property. The notice of the Proposed Uses clearly stated, among other things, that the permitted uses would be the same for the Lodge Parcel and the Village Center Parcel, thus putting the public on notice that the 2009 PUD Amendment allowed *new* uses on the Lodge Parcel. The notice provided the date and time the hearing was to be held, a location where the full proposal could be viewed, and a number to call with any questions. *See* Exhibit 14 of the Benson Complaint (NOT included in the record). The 2009 PUD Amendment was adopted through a public process which put all property owners on constructive notice that ANY of the 34 uses could be exercised as a use-by-right at ANY time. *South Creek Assoc.*, 781 P.2d at 1033-34(a property owner is deemed to have constructive notice of zoning provisions applicable to its property); *see also* Order re: Motion to Dismiss.

Even the most cursory review would have made it clear that 34 uses-by-right were being proposed on the Lodge Parcel. The Bensons' failure to review the actual language of the

amendment or otherwise track the approval in 2009 does not save their claim of defective notice. *South Creek Assoc. v. Bixby*, 753 P.2d 785, 787 (Colo.App.1987) (an adjoining property owner was put on notice regarding parking restrictions when such restrictions were listed in the PUD and that "**it was incumbent upon (Plaintiff) to peruse the provisions of the PUD which contained the parking restrictions**.")(emphasis added).

2. The Board did not Abuse its Discretion in Determining the Written Application Requesting the Amendment Cannot Control its Interpretation.

The Bensons argue the Board's interpretation is flawed because it failed to expressly consider the statements of the applicant's counsel in a cover letter to a land use application summarizing the bases for the request for amendment. *See* Benson Brief, pp. 8-9. This argument is similar in nature to the one advanced by Cordillera with respect to the conditions for approval of the 2009 PUD Amendment. Rather than providing a duplicative response, the Board hereby reincorporates its response contained in Section C.3 herein (pp. 13-16).

3. The Board did not Abuse its Discretion in Determining the Resolution Issued in Connection with the 2009 PUD Amendment Cannot Control its Interpretation

Also similar to Cordillera's argument, the Bensons contend that the Board's interpretation is flawed for not considering conditions of approval associated with the 2009 PUD Amendment. For the reasons stated above, the Board hereby reincorporates its response contained in Section C.3 herein (pp. 13-16).

4. The Board did not Abuse its Discretion by Ignoring BH's Contemporaneous Explanation of the Purpose of the Amendment

With no legal analysis to explain why such allegation amounts to an abuse of discretion or misinterpretation of the law, the Bensons state that the Board ignored the testimony of Cordillera representatives. Any such allegation is irrelevant here. The Court considers whether

there is evidentiary support for the Board's decision and does not reweigh the evidence presented or substitute its own judgment for that of the Board. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008).

5. The Board Relied Upon Competent Evidence.

The Bensons' argument that the Board's decision was improperly based on only certain extrinsic evidence is misplaced. As set forth at length in Sections C.1 through C.3 herein, the Board's decision was based on competent evidence in the Record. Moreover, contrary to the Bensons' assertion, the Board based its decision on the plain language of the PUD, and such decision was reasonable based on the competent evidence provided at the hearing. *See also*, Section C.4 (pp. 16-20).

6. The Evidence the Board Relied Upon is Sufficient and Credible.

The Bensons' sixth argument relates to a "black-line" markup of the PUD purportedly attached to the application for PUD amendment in 2009. The black-line markup referenced in the Bensons' Brief is not a part of the Record, nor was this argument raised at the hearing below. Therefore, this issue or argument cannot be raised now. *See* Section D.1 (pp. 21-25) hereby reincorporated herein.

7. The Board's Interpretation is Consistent with the Purpose of the PUD as Demonstrated by Plain Language of the PUD.

Similar in substance to Cordillera's second and fourth arguments on appeal, the Bensons argue that the Board's interpretation is inconsistent with the nebulous "residential resort community" language contained in the PUD. In response to this contention, the Board reincorporates its responses contained in Sections C.2 (pp. 11-13) and C.4 (pp. 16-20) herein. [10]

[10] While at their core irrelevant and erroneous, Plaintiffs imply that County officials were wrongly influenced by and/or inappropriately working in concert with CCG to authorize the Proposed Use under the PUD. (Benson Brief, pp. 4-5; Cordillera Brief, pp.5-6; 16). Disappointments and neighbor disputes are not uncommon in the context of land use decisions. It is unfortunate that in this case, such disappointment translated into conspiracy theories and finger pointing toward County officials and staff. It is commonplace, in fact encouraged, for a developer to discuss a future development plan with a county employee, such as the Director. To construe such a meeting as *ex parte* is

E. CONCLUSION

The Board's interpretation and findings in this matter are reasonable and must, therefore, be given deference by this Court. *See City and County of Denver*,55 P.3d at 254. Even greater deference should be given to the interpretation of the regulations by County staff. *See City and County of Denver v. Industrial Commission*, 690 P.2d 199, 203 (Colo.1984); *Humana, Inc. v. Board of Adjustment*, 537 P.2d 741, 743 (Colo. 1975). The burden is on the individual challenging the action of the Board to overcome the presumption that the Board's acts were proper. "Of critical importance here is the limited role of the judiciary in zoning cases. The judicial branch is ill-equipped to sit as a zoning commission and to sift through the facts and weigh the nuances involved. Fundamentally, a zoning ordinance is presumed to be valid; and one assailing it bears the burden of overcoming that presumption, and the courts must indulge every intendment in favor of its validity" *Id*. The Plaintiffs have not begun to meet this heavy burden. The decisions made by the Board were reasonable and there is more than ample, competent evidence in the record in support of these decisions.

Respectfully submitted this 16th day of June, 2017.

s/ *Beth Oliver*
Bryan R. Treu
Beth A. Oliver
Eagle County Attorneys
Attorneys for:
EAGLE COUNTY, COLORADO

---

disingenuous; there is no requirement that a county employee alert neighbors whenever a private property owner seeks guidance or input as the application of county regulations to his or her property. It is equally absurd to construe the fact that the Director discussed the matter with the county attorney and sent a courtesy draft to the requesting party prior to issuing an interpretation as some sort of "work in concert" with the developer. As the Colorado Supreme Court explains "[i]t is well established that courts presume the validity and regularity of official acts of public officials and entities. Furthermore, courts presume that public officials discharge their duties properly and in compliance with the law." *Crested Butte S. Metro. Dist. v. Hoffman*, 790 P.2d 327, 329 (Colo. 1990)(citations omitted).

CERTIFICATE OF SERVICE

I certify that on June 16, 2017, a true and correct copy of **DEFENDANT BOARD OF COUNTY COMMISSIONERS OF EAGLE COUNTY'S RULE 106 CONSOLIDATED ANSWER BRIEF** was served via ICCES e-filing to:

Terence P. Boyle
Mark Apelman,
Attorneys for Plaintiffs Barbara and Jack Benson

Thomas B. Wilner
Attorneys for Plaintiffs Barbara and Jack Benson

Neil H. Koslowe
Attorneys for Plaintiffs Barbara and Jack Benson

Lew M. Harstead
Michael S. Davidson
JOHNSON & REPUCCI LLP
Attorneys for Plaintiffs Cordillera Property Owners Association and Cordillera Metropolitan District

Sarah J. Baker
Sarah J. Baker P.C.
Attorney for Behringer Harvard Cordillera, LLC

/s/ Andrew Owen
Eagle County Government