

<b>District Court, Eagle County, State of Colorado</b> 885 Chambers Avenue, Eagle, Colorado 81631	DATE FILED: April 21, 2017 3:03 PM FILING ID: 1BE8D8ACAB434 CASE NUMBER: 2016CV30361  <b>▲ COURT USE ONLY ▲</b>
<b>Plaintiffs:</b> BARBARA AND JACK BENSON; CORDILLERA PROPERTY OWNERS ASSOCIATION, INC.; and CORDILLERA METROPOLITAN DISTRICT  <b>Defendant:</b> EAGLE COUNTY, COLORADO, acting by and through its BOARD OF COUNTY COMMISSIONERS	
<b>Attorneys for Plaintiffs:</b> Lew M. Harstead, #27325 Michael S. Davidson, #42319 JOHNSON & REPUCCI LLP 2521 Broadway, Suite A Boulder, Colorado 80304 Telephone: 303-442-1900 Email: lmharstead@j-rlaw.com; msdavidson@j-rlaw.com	Case No. 16CV30361 (Consolidated with Case No. 16CV30363)  Div. 4
<b>OPENING BRIEF OF CORDILLERA PROPERTY OWNERS ASSOCIATION AND        CORDILLERA METROPOLITAN DISTRICT</b>	

Plaintiffs Cordillera Property Owners Association, Inc. (the “Association”) and Cordillera Metropolitan District (the “District”), through undersigned counsel, hereby file their Opening Brief pursuant to C.R.C.P. 106(a)(4).

**INTRODUCTION**

This matter arises from the Eagle County Board of County Commissioners’ interpretation that an addiction treatment center and residential rehabilitation facility is a use-by-right on certain parcels in Cordillera. The Cordillera PUD does not authorize such a use. In fact, such a use would violate the purpose and intent of the PUD. Such a use would also violate the conditions of approval of a 2009 amendment of the PUD. And, the legislative history of the 2009 amendment makes clear that such a use was never intended in the Cordillera PUD. Thus, the practical effect of the Board’s action was to amend the PUD under the guise of interpreting it.

The Board therefore abused its discretion and exceeded its jurisdiction when it determined that an addiction treatment center and residential rehabilitation facility is a use-by-right on the subject parcels in Cordillera.

### **FACTUAL BACKGROUND**

#### **A. The Lodge and Village Center Parcels**

Behringer Harvard Cordillera, LLC (“Behringer”) owns the Lodge Parcel and Village Center Parcel in Cordillera (collectively, the “Parcels”). R.000671. The Lodge Parcel was created to feature The Lodge and Spa at Cordillera (“The Lodge”) as the “community centerpiece.” R.000417-423. The adjacent Village Center Parcel was intended to “provide a focal point to the community” and serve as “a social gathering place.” R.000363.

Use of the Parcels is governed by the Eleventh Amended and Restated version of Cordillera’s Planned Unit Development Control Document (the “PUD”). R.000342-414. The PUD makes clear that the “Cordillera Community is intended to be “a nearly self-contained resort residential community” and that the purpose of the PUD is “to insure that Cordillera is developed as a comprehensively planned resort residential community.” R.000347.

#### **B. The Prior PUD and 2009 PUD Amendment**

Prior to December 2009, the operative version of the PUD was the Tenth Amended and Restated version adopted in 2003 (the “Prior PUD”). R.000424-501. The Prior PUD recognized only two Permitted Uses as uses-by-right on the Lodge Parcel and 21 Permitted Uses as uses-by-right on the Village Center Parcel. R.000441; R.000447. The Prior PUD did not recognize an addiction treatment center and residential rehabilitation facility as a use-by-right on either of the Parcels. *Id.*

Behringer sought to amend the Prior PUD in mid-2009. R.000627. The Prior PUD required the Association's approval for any amendment. R.000432. The Association's approval was discretionary. R.000505.

In order to obtain the Association's approval, Behringer assured the Association that it did not seek to add any uses to the PUD and that its motivation was to merge the permitted uses on the Parcels in order to allow fractional/timeshare units that were permitted on the Village Center Parcel to be instead developed on the Lodge Parcel. *Id.*; R.000502. Behringer represented that the proposed amendment would help revitalize The Lodge for the better of the overall Cordillera community. R.000505. For its part, the Association was motivated by the desire to help The Lodge remain an integral part of the community and sought to ensure that any amendments were in the best interest of the entire Cordillera community (not just Behringer). R.000503; R.000505.

Behringer proposed an amendment that included "Medical Offices/Facilities" as a listed use without any limitation. R.000542-561. When the Association made clear that it was not willing to approve so broad a use, Behringer assured the Association that it only sought to recognize the use of limited medical procedures that were consistent with the already-existing operation of the spa at The Lodge (such as botox, rhinoplasty and other similar cosmetic procedures consistent with the operation of the then-trending concept of "medi-spas"). R.000506.

Based on Behringer's representations, the Association revised the proposed amendment to narrow and constrain the language of the proposed amendment, so that permitted uses would be "limited to clinic and outpatient facilities providing non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures." *Id.*; R.000507-523.

The purpose for this revision was to clarify that limited medical services consistent with the operation of a spa could be offered at The Lodge's spa similar to other "destination spas" around the world. R.000503. Because spa uses were already authorized on the Parcels, the addition of "medi-spa" type medical uses were not "new" uses. R.000441; R.000447.

Behringer agreed to the Association's changes, thus obtaining the Association's approval for the proposed amendment. Behringer then submitted the proposed amendment to the Board (the "2009 PUD Amendment") and, in seeking approval, made the following representations:

- The Amendment would not introduce new or additional density or uses to the PUD, or otherwise substantively change the PUD;
- The Amendment would not have any effect on adjacent properties;
- The Amendment would not confer a special benefit upon any particular person; but
- To the contrary, the Amendment would benefit the entire Cordillera PUD and surrounding area. (R.000627-632.)

In turn, the County approved the 2009 PUD Amendment and, in doing so, made Behringer's representations specific conditions of approval. R.000345.

The 2009 PUD Amendment thus resulted in the recognition of the following use-by-right on the Parcels:

Medical Offices/Facilities – **limited to clinic and outpatient facilities for non-critical care**, including without limitation, for outpatient plastic surgery and other cosmetic procedures. (R.000357-364, emphasis added.)

However, consistent with the intent of the 2009 PUD Amendment, addiction treatment centers and residential rehabilitation facilities were not listed as uses-by-right on the Parcels. *Id.*

### **C. CCG's Proposed Use of the Parcels**

In 2016, Concerted Care Group Management ("CCG") entered into a contract to purchase the Parcels from Behringer for the purpose of converting The Lodge into an addiction treatment center and residential rehabilitation facility. CCG described the use as follows:

- "The facility we will operate will be a luxury inpatient/residential treatment & sober living facility that will focus on addiction treatment" (R.000661);
- Which is intended to serve "a niche not currently being filled in the market: the seamless melding of luxury accommodations and amenities with exceptional clinical care" (R.000297-298);
- Where the patients/residents "will reside in the Clinic for the period of their treatment" (R.000658);
- At an average stay costing "\$60,000 per month" because "along with treatment, patients pay for anonymity" (R.000299-300);
- And to provide for such anonymity, the "Lodge itself must remain as a private and controlled environment... without access by the greater community" (R.000788);
- Thus, "distancing the Cordillera community" from the work done by CCG on the Parcels (R.000297-298).

### **D. The Director's Interpretation**

Because an addiction treatment center and residential rehabilitation facility was not listed as a use-by-right in the PUD, CCG sought an interpretation from the County's Director of Community Development (the "Director") pursuant to the County's Land Use Regulations ("County Regulations") that CCG's proposed use represented a use-by-right on the Parcels.

CCG engaged an agent and an attorney who worked closely with the Director in order to obtain the determination. R.000638-639. In soliciting a meeting with the Director, CCG's agent asked to "keep the matter extremely confidential" and "on the down low." *Id.* CCG's agent and attorney then met privately with the Director in May 2016 and verbally requested that the

Director issue an interpretation that an addiction treatment center and residential rehabilitation facility met the definition of a “clinic and outpatient facility for non-critical care” and thus CCG’s proposed use was a use-by-right under the “Medical Offices/Facilities” provision of the PUD. R.000641. The Director concluded at that very meeting, without any further research or consideration, that CCG’s proposed use was a use-by-right under the PUD. *Id.*

CCG’s agent subsequently requested that the Director “verify” his interpretation in a formal letter and provided the language that CCG wanted in the letter. *Id.* The Director sent CCG’s agent and attorney a “DRAFT” interpretation letter which the Director requested CCG’s representatives “edit.” R.000642. CCG’s agent and attorney reviewed and approved the Director’s draft interpretation letter. R.000643-644.<sup>1</sup> The Director then formally issued the interpretation letter stating that CCG’s proposed use was a use-by-right. R.000645.

After issues arose whether CCG was entitled under the County Regulations to seek an interpretation (since it did not yet own the Parcels), Behringer submitted its own request for interpretation and the Director re-issued the same interpretation. R.000671-675.

#### **E. The Board’s Interpretation**

The Association and District appealed the Director’s interpretation to the County’s Board of County Commissioners (the “Board”). R.000258-318; R.000319-320. The Association and District submitted a Position Statement and substantial evidence demonstrating that the Director erred in reaching his interpretation and that an addiction treatment center and residential rehabilitation facility was not a use-by-right on the Parcels. R.000321-730.

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<sup>1</sup> See also R.000648 (after complaints arose about the Director’s interpretation, the Director asked the County Manager to “help” the Board “understand that this interpretation was not made in a vacuum” because CCG’s attorney and the County Attorney had assisted the Director).

The Board held a public hearing on the appeal of the Director's interpretation in September 2016. R.000001-231 (transcript of hearing). At the hearing, the Board simply concluded that CCG's proposed use fit within the uses-by-right listed in the PUD. R.000855-859. In doing so, the Board refused to consider the purpose of the PUD. R.000181-194. Similarly, the Board ignored the conditions of approval it imposed on Behringer when it approved the 2009 PUD Amendment. R.000345. Moreover, despite acknowledging that the operative provision of the PUD was ambiguous, the Board refused to consider the legislative intent of the 2009 PUD Amendment's inclusion of the ambiguous language. R.000057. As such, the Board affirmed the Director's interpretation with only a modification that the clinic component be operated as an outpatient facility. R.000859.

### **ARGUMENT**

A court may void a final quasi-judicial decision by an administrative agency when that agency abused its discretion, exceeded its jurisdiction, or when it applied an erroneous legal standard in reaching its decision. C.R.C.P. 106(a)(4); *City and Cty. of Denver v. Bd. of Adjustment for the City and Cty. of Denver*, 55 P.3d 252, 254 (Colo. App. 2002).

In this case, the Board abused its discretion and exceeded its jurisdiction for the reasons set forth below and the Court should therefore void the Board's decision that an addiction treatment center and residential rehabilitation facility is a use-by-right on the Parcels.

1. **The Board Abused its Discretion When it Misinterpreted the PUD to Conclude an Addiction Treatment Center and Residential Rehabilitation Facility is a Use-By-Right**

Courts may consider whether there was a misinterpretation or misapplication of governing law in determining whether there was an abuse of discretion. *Sierra Club v.*

*Billingsley*, 166 P.3d 309, 312 (Colo.App. 2007). In this case, the Board misinterpreted the PUD when it concluded that CCG’s proposed use represented a use-by-right set forth in the PUD.

The PUD lists 34 specific “Permitted Uses” that represent uses-by-right on the Parcels. R.000357-358, R.000363-364. This broad list does not include an addiction treatment center or any type of facility for the treatment of alcoholism, chemical dependency, eating disorders, behavioral health conditions or other addictions as a use-by-right. *Id.* Similarly, the PUD does not list a residential rehabilitation facility or group home as a use-by-right. *Id.*

CCG was therefore left to seek an administrative interpretation that its proposed use somehow fit within the PUD’s definition of a medical/office facility that is “limited to clinic and outpatient facilities for non-critical care” as allowed by the PUD. R.000641. CCG’s representatives then worked in concert with the Director to reach an interpretation that CCG’s proposed use represented a “clinic” and was thus a use-by-right. *Id.*; R.000233.

On appeal of the Director’s interpretation, the Board was provided with substantial evidence that CCG’s proposed addiction treatment center and residential rehabilitation facility does not meet the definition of a “clinic” under the County’s own Regulations<sup>2</sup>; does not meet the definition of a “clinic” under state law<sup>3</sup>; and is not limited to providing only “non-critical care.”<sup>4</sup> The evidence in the Record therefore demonstrated that CCG’s proposed use is not

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<sup>2</sup> See R.000678-679 (affidavit of licensed physician who established and operated medical facilities in Vail, Avon and Gypsum making clear that the operation of an addiction treatment center does not fall within the definition of a “clinic” under the County Regulations).

<sup>3</sup> See R.000680-710 (report from a health care law attorney that certain services proposed by CCG rise to the standard of a “Psychiatric Hospital” under Colorado law).

<sup>4</sup> See R.000711-713 (affidavit of licensed physician who treat patients with addiction withdrawal symptoms that the operation of an inpatient treatment facility for alcohol or substance addiction “must necessarily have a critical care component because a certain number of patients in these facilities will require critical care”).

“limited to clinic and outpatient facilities for non-critical care” and therefore cannot be considered as a medical/office facility allowed as a use-by-right in the PUD.

In light of the evidence that CCG’s proposed addiction treatment center and residential rehabilitation facility failed to meet the definition of a “clinic,” the Board decided to uphold the Director’s interpretation by employing a “shotgun” approach to find that CCG’s proposed use somehow fit within any one of a number of use-by-rights enumerated in the PUD:

The proposed use clearly meets the various uses-by-right allowed on the Property, including but not limited to, medical offices and facilities, lodging and accommodations, meeting rooms, conference facilities, service commercial, professional offices, residential single-family, townhome, multi-family, condominiums and/or fractional interest ownership, and educational facilities. (R.000856-857.)

The Board’s determination in this regard defies logic. An addiction treatment center and residential rehabilitation facility fails to meet the plain-language definition of any single one of these uses listed by the Board. The Board was therefore left to reason that CCG’s proposed use could be bifurcated and treated as separate and distinct uses such that the proposed addiction treatment center could be categorized as a medical use, while the residential rehabilitation facility could be considered an altogether different residential use. R.000184.

However, in doing so, the Board distorted and misconstrued CCG’s proposed use. CCG made clear that its proposed use was for a single facility providing both treatment and residential services. R.000661 (“The facility we will operate will be a luxury inpatient/residential treatment and sober living facility that will focus on addiction treatment”). In fact, CCG’s principal expressly stated that CCG’s business model was to integrate residential and treatment components in a luxurious setting. R.000297 (“I identified a niche not currently being filled in

the market: the seamless melding of luxury accommodations and amenities with exceptional clinical care”).

The Board’s distortion of CCG’s proposed use was further evident in the Board’s determination that CCG’s “proposed use is for addiction patients to stay in lodging rooms and receive outpatient treatment in addition to other therapeutic amenities such as yoga, classes, spa treatments, etc.” R.000856 (emphasis added). This characterization is simply illogical. It is paradoxical to claim that patients will “receive outpatient treatment” when those patients must “stay in lodging rooms” in order to receive that treatment. *Id.* To the contrary, by definition, if a patient is required to stay in a facility to receive treatment, then the patient is receiving inpatient treatment. Thus, CCG’s proposed use is clearly not limited to outpatient care.

The Board therefore abused its discretion when it misinterpreted the PUD to determine that an addiction treatment center and residential rehabilitation facility fit within the listed use-by-rights in the PUD.

**2. The Board Abused Its Discretion by Failing to Give Effect to the Purpose and Intent of the PUD**

The County Regulations expressly mandate that, when interpreting any provision, the Board is bound to consider the “purposes for which the regulation was initially adopted.” *See* County Regulations at § 5-220.B.1.

In this case, the purpose and intent for the PUD governing development in Cordillera are expressly set forth as follows:

***Section 1.02 Purpose.*** [T]he purpose of this [PUD] is to insure that Cordillera is developed as a comprehensively planned resort residential community. The [PUD] will insure the orderly and compatible development of the property. (R.000347, emphasis added.)

**Section 1.03 Intent.** The Cordillera Community is intended to be a nearly self-contained resort residential community. Cordillera will provide for a balanced mixture of residential, commercial, office, and undisturbed natural lands to support the focus of resort residential uses. (R.000347, emphasis added.)

CCG's proposed use of the Parcels is contrary to this stated purpose and intent. CCG seeks to create a compound that will "distance" The Lodge from the rest of the Cordillera community in order to provide "complete anonymity" to CCG's clients and exclude the greater Cordillera community. R.000297-301; R.000788. Such a use is simply not intended "to support the focus of resort residential uses" in Cordillera, nor is such a use intended "to support the focus of the resort residential community." R.000347.

CCG's proposed use thus violates the express purpose and intent of the PUD. *Id.* The Board, however, failed to consider the purpose and intent of the PUD altogether. R.000857 (the "general [purpose] language does not trump the clear uses-by-right."). In fact, the Board stated it did not need to consider whether CCG's proposed use is consistent with that purpose. R.000185; R.000187 ("our purpose tonight isn't to consider compatibility.").

The Board therefore abused its discretion in failing to give effect to the purpose of the PUD when making its interpretation.

**3. The Board Abused Its Discretion and Exceeded its Jurisdiction by Failing to Apply the Conditions of Approval of the 2009 PUD Amendment**

Courts may consider whether there was a misapplication of governing law in determining whether there was an abuse of discretion. *Canyon Area Residents for the Environment v. Comm'rs of Jefferson County*, 172 P.3d 905, 907 (Colo.App.2006). Furthermore, a governmental body exceeds its jurisdiction when it exercises discretion that it does not have. *Colorado Springs v. Securcare Self*, 10 P.3d 1244, 1247 (Colo.2000).

In this case, Behringer made the following representations when seeking approval of the 2009 PUD Amendment:

The Amendment does not introduce new or additional density or uses to the Existing PUD, or otherwise substantively change the Existing PUD. Rather, the proposed changes include corrections to typographical errors, replacement of inaccurate Guide Maps, updates to reflect the current status of development approvals for the Lodge Parcel and the Village Center Parcel, and clarification of the treatment of the Lodge Parcel and the Village Center Parcel as a single planning parcel.

ADJACENT PROPERTIES. The Amendment will not have any effect on adjacent properties because it does not change the overall uses or densities currently contemplated in the Existing PUD.

BENEFIT. The Amendment will not confer a special benefit upon any particular person. To the contrary, it will benefit the entire Cordillera PUD and surrounding areas, as it will make the development contemplated by the Existing PUD more efficient.

R.000627-629, emphasis added.

Significantly, in approving the 2009 PUD Amendment, the County mandated that Behringer's representations "shall be adhered to and considered conditions of approval."

R.000345, emphasis added.

The Board's interpretation, however, failed to adhere to Behringer's representations or abide by the conditions of approval. To the contrary, the Board's interpretation improperly recognized new and additional uses for the Parcels. R.000857 (Board Resolution finding "there were, in fact, 24 additional uses added to the Lodge Parcel in the 2009 PUD Amendment"). Moreover, the Board's interpretation clearly confers a special benefit on one particular owner, CCG so it can provide anonymity to its high-paying customers – all to the detriment of the rest of the Cordillera community which is effectively barred from the Parcels that were intended to be the centerpiece and social gathering place for the PUD.

The Board's interpretation thus violates the very conditions of the 2009 PUD Approval that were intended to protect the Cordillera community. The Board simply did not have discretion to ignore the conditions of approval when interpreting the PUD.

The Board therefore abused its discretion and exceeded its jurisdiction by failing to give effect to the conditions of the 2009 PUD Amendment when rendering its interpretation.

**4. The Board Abused Its Discretion By Determining that the PUD was Ambiguous But Failing to Give Effect to the Legislative Intent of the Operative Provision of the 2009 PUD Amendment**

If statutory language is ambiguous and susceptible to alternate constructions, the reviewing body must look to other principles of statutory construction to ascertain the legislative intent. *Farmers Ins. Exch. v. Bill Boom Inc.*, 961 P.2d 465, 469-470 (Colo. 1998). Legislative intent is determined by considering the objective sought to be attained by the legislation, the accompanying legislative declaration and the problem addressed by the legislation. *Id.*

In this case, the Board acknowledged that the operative provision of the PUD for which CCG requested an interpretation was ambiguous. R.000057 (“So, again, I just think it – it goes to this point of sort of this ambiguous language and the broadness of ‘clinic’”); R.000192 (“I am in agreement that we should limit the use to outpatient . . . I don’t actually know that that’s the only interpretation.”).

The ambiguous provision – allowing for medical facilities/offices “limited to clinic and outpatient facilities for non-critical care” – was added to the PUD during the 2009 PUD Amendment. R.000441; R.000447. However, despite acknowledging the ambiguity, the Board refused to examine the legislative intent of the 2009 PUD Amendment. R.000182 (“I think we have to assume that that is the legislative intent, is those 34 uses that are in the 2009 [Guide]”);

R.000186 (“But what we’re stuck with is the actual words that got written down, the words that were changed in the PUD guide”).

As a result, the Board entirely ignored the overwhelming evidence in the Record demonstrating that the legislative intent of the 2009 PUD Amendment was never to allow The Lodge to be converted to a compound for the operation of an addiction treatment center and residential rehabilitation facility:

- The Prior PUD did not list medical offices/facilities as a use-by-right on the Lodge Parcel (R.000441);
- In 2009, Behringer proposed a possible amendment listing “medical offices/facilities” as a use-by-right without limitation, but the Association refused to approve such an unrestricted use (R.000506-507);
- Behringer represented that it sought to recognize only limited medical uses consistent with the operation of a high class spa and the then-trending concept of “medi-spas” and assured the Association that it did not seek to add any uses to the PUD, but rather that it sought to amend the Prior PUD to help revitalize The Lodge for the better of the overall Cordillera community (R.000502; R.000506; R.000629);
- Based on Behringer’s representations, the Association modified the proposed amendment to limit the “Medical Offices/Facilities” use “to clinic and outpatient facilities providing non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures” (R.000506; R.000612-626);
- The purpose for this limitation was to clarify that limited medical services consistent with the operation of a spa could be offered at The Lodge’s spa similar to other “destination spas” around the world (R.000503; R.000506);
- Behringer never expressed any intention to operate an addiction treatment center and residential rehabilitation facility, let alone convert the entire Lodge Parcel to a facility excluding the Cordillera community (R.000503; R.000506);
- The Association would not have approved such a change to the PUD because the Association sought to ensure that any amendments were in the best interest of the entire Cordillera community (not just Behringer), and to help The Lodge remain an integral part of the greater Cordillera community (R.000502; R.000505).

To be clear, the language limiting the use of Medical Offices/Facilities to “clinic and outpatient facilities for non-critical care” was added by the Association. R.000612-626. Thus, the clear intent of the 2009 PUD Amendment was to help revitalize The Lodge for the benefit of both Behringer and the entire Cordillera community – but not to allow the operation of an addiction treatment center and residential rehabilitation facility as a use-by-right, let alone any use that would convert the entire Lodge Parcel to a facility excluding the entire Cordillera community. R.000502-506.

The Board, however, simply refused to consider the legislative intent of the 2009 PUD Amendment. R.000855-859; R.000188 (“we can’t go by memos that say, well, the intent was no new uses; we had a conversation at the meeting and here are the minutes, and it shows that we said there will be no new uses. We can’t – we can’t make our judgments on that.”).

The Board therefore abused its discretion by failing to ascertain and give effect to the legislative intent of the 2009 PUD Amendment.

**5. The Board Exceeded its Jurisdiction by Wrongfully Amending the PUD Under the Guise of Interpreting the PUD**

Judicial deference to an interpretation of a zoning official cannot extend to allowing those officials to amend the ordinance in the guise of interpreting it. *Anderson v. Bd., Adjust., Zoning*, 931 P.2d 517, 520 (Colo.App.1996).

In this case, the PUD expressly requires the Association’s approval for any amendment of the PUD to be valid. R.000348. The PUD does not list an addiction treatment center and residential rehabilitation facility as a use-by-right. *See* Argument 1 above. In fact, such a use would be contrary to the purpose and intent of the PUD. *See* Argument 2 above. Such a use would also be in violation of the conditions of the 2009 PUD Amendment. *See* Argument 3

above. Accordingly, the Association would not have authorized an amendment to include an addiction treatment center and residential rehabilitation facility as a use-by-right on the Parcels (or any other use that completely segregated the Cordillera community). See Argument 4 above.

Thus, rather than pursuing a futile attempt to amend the PUD, CCG's representatives worked in concert with the Director in order to attempt to interpret the PUD in such a manner as to avoid amendment of the PUD. R.000641-644. In turn, the Board ratified the improper interpretation, despite the objections of the Association and the clear evidence in the Record that the Association never would have approved such a use. R.000502-506.

Therefore, the Board exceeded its jurisdiction by effectively amending the PUD under the guise of interpreting the PUD.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, the Association and District respectfully request that this Court therefore reverse the Board's interpretation.

Respectfully submitted on April 21, 2017.

JOHNSON & REPUCCI LLP

*s/ Lew M. Harstead*

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Lew M. Harstead

*Attorneys for the Association and District*

### **CERTIFICATE OF SERVICE**

I certify that on April 21, 2017 the foregoing was served via electronic service to the following: Terence P. Boyle, Esq. and Mark Apeleman, Esq. (Counsel for Barbara and Jack Benson); Bryan Robert Treu, Esq. and Beth Ayers Oliver, Esq. (Counsel for Eagle County); Sarah J. Baker, Esq. (Counsel for Behringer Harvard Cordillera, LLC).

*s/ Trina Rioux*

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Trina A. Rioux