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| <b>District Court, Eagle County, State of Colorado</b><br>885 Chambers Avenue, Eagle, Colorado 81631   | <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>   |
| <b>Plaintiffs:</b><br>BARBARA AND JACK BENSON; CORDILLERA<br>PROPERTY OWNERS ASSOCIATION, INC.; and<br>CORDILLERA METROPOLITAN DISTRICT<br><br><b>Defendant:</b><br>EAGLE COUNTY, COLORADO, acting by and through<br>its BOARD OF COUNTY COMMISSIONERS<br><br><b>Intervenor:</b><br>BEHRINGER HARVARD CORDILLERA |  |
| <b>Attorneys for Plaintiffs:</b><br>Lew M. Harstead, #27325<br>Michael S. Davidson, #42319<br>JOHNSON & REPUCCI LLP<br>2521 Broadway, Suite A<br>Boulder, Colorado 80304<br>Telephone: 303-442-1900<br>Email: lmharstead@j-rlaw.com; msdavidson@j-rlaw.com   | <p style="text-align: center;">Case No. 16CV30361<br/>       (Consolidated with<br/>       Case No. 16CV30363)</p> <p style="text-align: center;">Div. 4</p> |
| <b>CORDILLERA PARTIES' REPLY BRIEF</b>   |  |

Plaintiffs Cordillera Property Owners Association, Inc. and Cordillera Metropolitan District (collectively, the “Cordillera Parties”), through undersigned counsel, hereby file this Reply Brief in support of their Opening Brief (the “Opening Brief”) and in reply to the Answer Briefs filed by Defendant Eagle County (the “County” and the “County Answer Brief”) and Intervenor Behringer Harvard Cordillera (“Behringer” and the “Behringer Answer Brief”).<sup>1</sup>

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<sup>1</sup> Capitalized terms in this Reply Brief shall have the same meaning as set forth in the Opening Brief, unless otherwise defined in this Reply Brief.

## INTRODUCTION

This case arises from CCG's attempt convert The Lodge from the centerpiece of the Cordillera resort community to a confined Residential Treatment Facility limited only to patients who stay and receive treatment at The Lodge.

CCG sought an interpretation from the Board that CCG's proposed operation of a Residential Treatment Facility providing *inpatient* care represented a use-by-right on the Parcels pursuant to the Cordillera PUD.

The Board concluded that inpatient care is not a use-by-right under the PUD. Yet, the Board nonetheless determined that CCG's proposed Residential Treatment Facility represented a use-by-right.

To reach its paradoxical determination, the Board first bifurcated CCG's proposed use into separate medical and residential uses in order to claim that if each use is considered distinctly, the residential use would fall within one use-by-right and the medical use would fall within another use-by-right. The Board's bifurcation, however, is an artificial distinction which defies the actual use proposed by CCG – namely for a single, confined Residential Treatment Facility where one must be a patient to stay at The Lodge, and one must stay at the Lodge to be a patient. This use is simply not a bifurcated use as framed by the Board.

Furthermore, in order to overcome its own determination that inpatient care is not a use-by-right, the Board characterized CCG's proposed medical care as outpatient treatment. In doing so, the Board ignored and disregarded the clear evidence in the Record that CCG by its own representations intends to provide inpatient care at the Residential Treatment Facility.

Ultimately, the Board's actions are nothing more than an attempt to fit a square peg in a round hole. CCG proposes the operation of a single, confined Residential Treatment Facility. But the PUD does not list a Residential Treatment Facility as a use-by-right and the PUD does not allow inpatient care as a use-by-right. So the Board manipulated the true nature of CCG's proposed use in order to reach an interpretation that simply isn't supported by the evidence in the Record. The Board, in doing so, abused its discretion.

The effective result of the Board's wrongful actions was to amend the PUD to now include a Residential Treatment Facility as a new use-by-right while acting under the guise of interpreting the PUD. As such, the Board exceeded its jurisdiction.

### **ARGUMENT ON REPLY**

#### **I. THE BOARD ABUSED IS DISCRETION WHEN IT MISINTERPRETED THE PUD TO CONCLUDE CCG'S PROPOSED USE IS A USE-BY-RIGHT**

As set forth in Argument 1 of the Opening Brief, 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. Opening Brief at Argument 1.

In response, the County claims that the Board interpreted CCG's proposed use to be a use-by-right under the plain, unambiguous language of the PUD (County Answer Brief at Argument 1) and Behringer simply argues the Board's decision must be upheld because it is supported by competent evidence in the record (Behringer Answer Brief at Argument A). However, as set forth below, the County and Behringer's arguments fail upon consideration of the actual evidence in the Record.

**A. CCG’s Proposed Use is Not Listed as One of the 34 Specifically-Enumerated Uses-By-Right on the Parcels**

The PUD lists 34 specific “Permitted Uses” that represent uses-by-right on the Parcels. R.000357-358; R.000363-364. Examination of this list demonstrates that CCG’s proposed use is not plainly enumerated as a use-by-right.

As set forth in the Opening Brief, an addiction treatment center and residential rehabilitation facility is not set forth on the PUD’s list of uses-by-right. *Id.* In response, the County argues that the Cordillera Parties engaged in semantics by characterizing CCG’s proposed use “as an ‘addiction treatment center’ and ‘residential rehabilitation facility.’” County Answer Brief at p. 4. To the contrary, CCG’s principal himself stated:

The facility we will operate will be a luxury **inpatient/residential treatment & sober living facility** that will focus on **addiction treatment** and other behavioral health disorders...This letter is a requirement of getting a license from the State of Colorado to provide **residential treatment/inpatient services**.

R.000661-662, emphasis added.

Regardless, CCG consistently and repeatedly described its proposed use as a “residential treatment facility” as demonstrated by the following evidence provided to the Board:

- CCG’s attorney confirmed that CCG sought to use the Parcels “for the purpose of using and operating the property as a **residential treatment facility**...” (R.000766 for July 8, 2016 correspondence from CCG’s attorney to the Board, emphasis added; *see also* R.000785 for September 12, 2016 correspondence from CCG’s attorney to the Board);
- The Director informed the Board that CCG had presented an intent to operate The Lodge “as a **residential treatment facility**” (R.000015 for statement of Mr. Naracci to the Board, emphasis added);
- CCG’s agent described CCG’s proposed use as “a **residential treatment facility**” (R.000077-78 for statement of Mr. Mauriello to the Board, emphasis added);

- CCG’s attorney stated CCG sought to operate a clinic “in a **residential treatment facility**” (R.000091 for statement of Mr. Ragonetti to the Board, emphasis added);
- CCG’s attorney also confirmed the Board was provided with testimony from CCG’s principal and CCG’s medical director “that this facility is clearly intended to be a **residential treatment facility**” (R.000092 for statement of Mr. Ragonetti to the Board, emphasis added).

The PUD’s list of uses-by-right, however, fails to include any reference to a “Residential Treatment Facility” – just as it fails to include any reference to an addiction treatment center and residential rehabilitation facility. R.000357-358; R.000363-364. Therefore, despite the County and Behringer’s claims otherwise, CCG’s proposed use is not plainly enumerated as a use-by-right on the Parcels. *Id.*

**B. The Board’s Attempt to Bifurcate Lodging and Medical Uses is an Artificial Distinction that is Inconsistent with the Ordinary Meaning of CCG’s Proposed “Residential Treatment Facility”**

Because the PUD does not include a Residential Treatment Facility as a use-by-right, the Board attempted to bifurcate CCG’s proposed lodging and medical uses so that each of the bifurcated uses might be considered to fit within one of the uses-by rights actually enumerated in the PUD. Behringer Answer Brief at p. 11 (“the Facility was permitted under the PUD as a multi-family residential building for the residential portion of the Facility, and as an outpatient facility for non-critical care for the portion of the Facility that would provide clinical services”).

More specifically, the County and Behringer claim that CCG’s proposed residential component fits within the “multi-family residential” use-by-right, while the CCG’s proposed medical clinic component fits within the “medical offices/facilities” use-by-right and the “professional office” use-by-right allowed in the PUD. County Answer Brief at p. 9; Behringer Answer Brief at p. 14; *see also* R.000357-364 for the PUD.

This is, however, an artificial distinction that defies the ordinary meaning of CCG’s proposed use. By its own assertions, **CCG intends to operate a “residential treatment facility” – which is, by its ordinary meaning a single “facility” that provides “residential treatment.”** *See* Argument I.A. above, citing R.000766; R.000785; R.000015; R-000077-78; R.000091; R.000092.

In fact, far from segregating its proposed residential uses from its proposed medical care services, CCG’s principal made clear that CCG intends to “meld” CCG’s provision of residential and medical services. R.000297-298 (May 31, 2016 correspondence from CCG’s principal to the Cordillera Parties stating “I identified a niche not currently being filled in the market: the seamless melding of luxury accommodations and amenities with exceptional clinical care...”).

Similarly, CCG’s doctor confirmed that patients would receive “residential treatment.” R.000083 for statement of Dr. Kane to the Board (“Residential treatment is a low-intensity clinically-monitored service for stable patients that is designed to allow respite from the environment in which their disease is most active.”).

Furthermore, unlike the operation of a spa or restaurant at The Lodge that might be used by both guests of The Lodge and outsiders alike, CCG’s proposed residential component will only be accessible to individuals receiving medical care from CCG (R.000788 for statement of CCG’s attorney that “the Lodge itself must remain as a private and controlled environment for the people being treated there”), while CCG’s proposed medical care component will only be accessible to the patients staying at The Lodge (R.000095-96 for statement of CCG’s attorney that “for the clinic to operate effectively as a residential treatment facility, it has to be private. It has to be off-limits to others, outside of its patients and clinic personnel.”).

To be clear, CCG's proposed use mandates that one must stay at The Lodge in order to receive treatment as a patient and one must receive treatment as a patient in order to stay at The Lodge. *Id.* This result cannot logically be considered to be bifurcated uses.

Therefore, the County and Behringer's attempt to bifurcate the proposed lodging use from the proposed medical use is an artificial distinction that is entirely inconsistent with the ordinary meaning of Residential Treatment Facility, as well as CCG's intention to meld luxury accommodations and medical care in a single, confined facility. *Id.*

This Court therefore need not extend any deference to the County's attempt to bifurcate CCG's proposed uses. *Friends of the Black Forest Pres. Plan, Inc. v. Bd. of Cty. Commissioners of El Paso Cty.*, 381 P.3d 396, 400 (Colo.App.2016) (a reviewing court should defer to a governmental body where there is a reasonable basis for the governmental body's interpretation, but should not extend deference when a governmental body's interpretation is not uniform or consistent).

**C. CCG's Proposed Use Cannot Be a Use-By-Right in the PUD Because CCG's Proposed Residential Treatment Facility is an Inpatient Use and Not an Outpatient Use**

The Board concluded that inpatient uses cannot be considered uses-by-right under the PUD but, rather, only outpatient uses would fit within any of PUD's uses-by-right:

COMMISSIONER RYAN: "**I will say that I don't think inpatient use fits under the PUD.** And so I'm willing to uphold Bob's decision, but with a condition that it's not an inpatient facility, that it's clearly people go to the clinic during the day and then, you know, the rest of the time they're using the amenities just like any other visitor."

(R.000191, emphasis added.)

COMMISSIONER CHANDLER-HENRY: “And, Commissioner Ryan, **I am in agreement that we should limit the use to outpatient**, as has been represented tonight.”

(R.000192, emphasis added.)

COMMISSIONER MCQUEENEY: “... so **if something were happening there that’s not outpatient**, according to the licenses that have been applied for, **then there is an opportunity for zoning violations and other repercussions.**”

(R.000194, emphasis added.)

In fact, the Board specifically precluded inpatient treatment on the Parcels. County Answer Brief at p.2 (“The Board affirmed the Director’s Interpretation with a modification precluding inpatient treatment in the clinic component of the Property”).

Accordingly, in order to justify its determination that CCG’s proposed Residential Treatment Facility is a use-by-right, the Board concluded that “the proposed use is for addiction patients to stay in lodging rooms and **receive outpatient clinical treatment...**” County Answer Brief at p. 6, emphasis added. In furtherance of this conclusion, the County Answer Brief claims that “[t]he 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.” County Answer Brief at p. 4 citing R.000009 and R000312, italics in original, other emphasis added.

The County’s assertion is simply false – as evidenced by the County’s own citations to the Record. The testimony cited by the County at R.000009 actually provides “CCG’s intent is to acquire the Clubhouse, Lodge, Village Center, and other properties within Cordillera **for the purpose of establishing a clinic that will provide inpatient noncritical care** for treatment of a variety of conditions.” R.000009 for statement of Mr. Naracci, emphasis added. Similarly, the document cited by the County at R.000312 is an e-mail communication from CCG’s agent that

states that “the proposed use of the Lodge Parcel and lodge building itself is a clinic **including inpatient, non-critical care** for treatment of a variety of conditions...” R.000312 for e-mail communication from Mr. Mauriello to Mr. Naracci, emphasis added.

In fact, the Record contains overwhelming evidence of CCG’s intention to provide inpatient care:

- In seeking the Director’s interpretation, CCG’s agent represented “**the proposed use of the Lodge Parcel and lodge building itself is a clinic including inpatient**, non-critical care ...” (R.000312 for May 26, 2016 e-mail from Mr. Mauriello to Mr. Naracci, emphasis added);
- In issuing his interpretation, the Director concluded that “[t]he use proposed for the **Lodge Parcel and lodge building itself, is a clinic including inpatient, non-critical care**” (R.000233, emphasis added);
- CCG’s attorney stated to the Cordillera Parties that his firm “requested that the [Director] issue an interpretation of the PUD **in order to permit the use of the Property as an inpatient clinic** for treating non-critical conditions” (R.000649 for July 5, 2016 correspondence from Mr. Ragonetti to Mr. Harstead, emphasis added);
- CCG’s attorney argued to the Board in July 2016 that the Director’s interpretation “**that inpatient clinics are permitted in the PUD is correct...**” (R.000654 for July 5, 2016 correspondence from CCG’s attorneys to the Board, emphasis added);
- CCG’s attorney made the exact same argument to the Board in September 2016 that the Director’s interpretation “**that inpatient clinics are permitted in the PUD is correct...**” (R.000787 for September 12, 2016 correspondence from CCG’s attorneys to the Board, emphasis added);
- CCG’s principal confirmed in a letter to the Director that “[t]he facility we will operate will be a **luxury inpatient/residential treatment & sober living facility** that will focus on addiction treatment and other behavioral health disorders...” (R.000661 and R.000796 for undated correspondence from Mr. Nordheimer to Mr. Naracci attached to CCG’s July and September 2016 correspondence to the Board, emphasis added);
- In fact, CCG made clear that it requested a zoning interpretation letter from the Director because the letter was “**a requirement of getting a license from the State of Colorado to provide residential treatment/inpatient services.**” (*Id.*, emphasis added).

Furthermore, as set forth previously, the Director informed the Board at the public hearing that **CCG intended to “provide inpatient noncritical care** for treatment of a variety of conditions.” R.000009 for testimony of Mr. Naracci, emphasis added. In fact, Commissioner Ryan went so far as to question the Director on CCG’s intentions:

COMMISSIONER RYAN: “Okay. Well, you were -- it said clinic-plus multifamily residential.”

MR. NARRACCI: “Together.”

COMMISSIONER RYAN: “Together.”

MR. NARRACCI: “Yeah.”

COMMISSIONER RYAN: “**So together in your mind, does that equal inpatient?**”

MR. NARRACCI: “**That was the interpretation, yes.**”

(R.000026, emphasis added.)

For its part, during CCG’s portion of the presentation to the Board at the public hearing, not a single CCG representative referred to its proposed use as an “outpatient” facility – not CCG’s principal, not CCG’s attorney, not CCG’s agent, not CCG’s doctor. *See* R. 000065-96.

Instead, the concept of outpatient service only arose at the solicitation of Commissioner Chandler-Henry during the following exchange:

COMMISSIONER CHANDLER-HENRY: I just guess I have one clarification question for Mr. Nordheimer. And that is that your treatment model is for clients to be treated in an outpatient setting - - a doctor’s office or clinic -- and they spend the evenings in the residential facility; is that correct?

MR. NORDHEIMER: Yeah. There’s -- correct. 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.000178.)

This conclusory statement made in response to the Commissioner's leading question is simply not competent evidence that CCG's proposed use is for outpatient treatment – particularly in light of the wide body of evidence existing in the record that CCG seeks to provide inpatient treatment. R.000009 (as cited in the County Answer Brief at p.4); R.000312 (as also cited in the County Answer Brief at p.4); R.000233; R.000649; R. 000654; R.000787; R.000661; R.000796; R.000026; *see also* Argument I.B. above.

The Record is abundantly clear that CCG's proposed Residential Treatment Facility will provide inpatient care and that the interpretation before the Board was whether an inpatient facility was a use-by-right. *Id.*

Accordingly the Board abused its discretion when: (i) it disregarded the abundance of evidence in the Record regarding CCG's proposed inpatient use in order to wrongfully conclude that CCG's proposed use featured outpatient treatment; and thus (ii) it misapplied the PUD by effectively approving an inpatient use despite determining that an inpatient use is not a use-by-right on the Parcels. *Canyon Area Residents for the Environment v. Bd. of Cty. Comm'rs of Jefferson Cty.*, 172 P.3d 905, 907 (Colo. App. 2006) (an abuse of discretion occurs when a governmental body issues a decision that is not reasonably supported by any competent evidence in the record); *see also Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo.App.2007) (in determining whether there was an abuse of discretion, courts may consider whether there was a misinterpretation or misapplication of governing law).

**D. CCG’s Proposed Use Cannot Meet the Definition of a Medical Office/Facility Limited to Clinic and Outpatient Facilities Because the Proposed Residential Treatment Facility is Not a Clinic**

The County further argues that CCG’s proposed use “meets the plain definition of ‘clinic’” under the PUD’s “medical offices/facilities” use-by-right.<sup>2</sup> County Answer Brief at p.

7. In support of this position, the County claims that the “Record contains many examples of the ordinary and generally accepted meaning of the word ‘clinic’” and the County specifically cited to the following:

- R.000015 for the evidence that “a clinic is for **outpatient** non-ambulatory care” (*see* County Answer Brief at p. 7, emphasis added.);
- R.000132 for evidence that a “clinic is a place in which **outpatients** are given medical treatment or advice” (*Id.*, emphasis added);
- R.000131 for evidence that “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**” (*Id.*, emphasis added).

Common in these cites by the County is that **the County’s claimed ordinary and accepted meaning of the word “clinic” is predicated on the requirement that a clinic must provide outpatient treatment. *Id.***

However, as set forth in Argument I.C. above, the evidence in the Record clearly demonstrates that **CCG’s proposed Residential Treatment Facility will provide inpatient treatment.** R.000009 (as cited in the County Answer Brief at p.4); R.000312 (as also cited in

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<sup>2</sup> The PUD defines the referenced use-by-right as: “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.

the County Answer Brief at p.4); R.000233; R.000649; R. 000654; R.000787; R.000661; R.000796; R.000026.

Accordingly, not only did the County fail to rebut the competent evidence in the Record that CCG's proposed Residential Treatment Facility does not meet the definition of a clinic under the County's own regulations and under Colorado state law, the evidence demonstrates that CCG's proposed use cannot meet the County's claimed ordinary and generally accepted meaning of the word clinic.

The Board therefore abused its discretion when it determined that CCG's proposed Residential Treatment Facility met the definition of a clinic as required to be a use-by-right under the medical offices/facilities provision of the PUD. *Canyon Area Residents*, 172 P.3d at 907; *see also Sierra Club*, 166 P.3d at 312.

## **II. THE BOARD ABUSED ITS DISCRETION BY FAILING TO GIVE EFFECT TO THE PURPOSE AND INTENT OF THE PUD**

As set forth in Argument 2 of the Opening Brief, the Board abused its discretion by failing to give effect to the purpose and intent of the PUD. Opening Brief at Argument 2.

In response, the County and Behringer effectively claim, first, that the Board did not need to consider the purpose and, next, that the Board nonetheless properly determined that CCG's proposed use is consistent with the purpose and intent of the PUD. County Answer Brief at Argument 2; Behringer Answer Brief at Argument B. However, as set forth below, the County and Behringer's arguments fail upon consideration of the actual evidence in the Record.

### **A. The Board Was Obligated to Consider the Purpose of the PUD**

The County and Behringer each claim, in effect, that the Board was not required to consider the purpose of the PUD when issuing its interpretation. Specifically, the County argues

that because a specific statute is not controlled by a general statute, the specific uses-by right control over the PUD's generalized purpose statement. County Answer Brief at pp. 11, 13. Similarly, Behringer Harvard appears to claim that that Board was not required to consider the purpose of the PUD unless there exists an ambiguity. Behringer Answer Brief at p. 15.

To the contrary, the Board was obligated to consider the purpose of the PUD pursuant to the County Regulations, which expressly mandate:

In making interpretations to these Regulations, the [County] shall consider . . . the purposes for which the regulation was initially adopted.

(County Regulations at § 5-220.B.1.)

**B. The Board Failed to Consider the Purpose of the PUD**

The Record demonstrates that the Board failed to consider the purpose of the PUD altogether. R.000857 (“This general language does not trump the clear uses-by-right for the Lodge Parcel”). In fact, the Board determined that it did not need to consider whether CCG’s proposed use is consistent with the purpose of the PUD whatsoever. R.000185; R.000187 (“[t]he issue of compatibility . . . that was handled in 2009 when it became a use by right.”).

Accordingly, the Board violated the County Regulations in failing to consider the purpose of the PUD. County Regulations at § 5-220.B.1. The Board therefore abused its discretion by failing to apply the governing law. *Sierra Club*, 166 P.3d at 312.

**C. CCG’s Proposed Use is Inconsistent with the Purpose of the PUD**

As set forth in the Opening Brief, the Board abused its discretion because CCG’s proposed use is inconsistent with the purpose of the PUD and thus not a use-by-right.

In response, the County and Behringer argue that CCG's proposed use is consistent with the purpose of the PUD. County Answer Brief at pp. 12-13 ("The Lodge will still be operated as a resort residential use."); Behringer Answer Brief at p. 16 ("the Facility will provide a resort residential environment for the Clients").

To the contrary, CCG's proposed use is not consistent with the purpose and intent of the PUD. The purpose of the PUD is to "insure that Cordillera is developed as a comprehensively planned resort residential community. . . [and to] insure the orderly and compatible development of the property." R.000347, emphasis added. Similarly, the PUD's statement of intent requires that uses within the PUD "support the focus of resort residential uses." *Id.*, emphasis added.

CCG seeks to create a compound that will "distance" the Lodge from the rest of the Cordillera community. R.000297-298; R.000788. For CCG's proposed use "to function properly as a residential treatment facility, the Lodge itself must remain as a private and controlled environment for the people being treated there, without access to the greater community." R.000788. "It has to be off-limits to others, outside of its patients and clinic personnel." R.000096.

A use that cuts off the community's access to the Lodge—the very feature that makes Cordillera a "resort" community—is clearly not intended to "to support the focus of resort residential use" in Cordillera. R.000347. A use segregated from the larger community is similarly inconsistent with PUD's purpose to ensure that "Cordillera is developed as a comprehensively planned resort residential community." *Id.*, emphasis added.

Therefore, because CCG's proposed use is inconsistent with the stated purpose of the PUD, the Board abused its discretion in determining that CCG's proposed use is a use-by-right in the PUD. *Sierra Club*, 166 P.3d at 312.

### **III. THE BOARD ABUSED ITS DISCRETION AND EXCEEDED ITS JURISDICTION BY FAILING TO APPLY THE CONDITIONS OF APPROVAL OF THE 2009 PUD AMENDMENT**

As set forth in Argument 3 of the Opening Brief, the Board abused its discretion and exceeded its jurisdiction by failing to apply the conditions of approval of the 2009 PUD Amendment. Opening Brief at Argument 3.

In response, the County and Behringer provide a litany of arguments to obfuscate the issue and, in any event, ultimately deny that any conditions of approval exist for which the Board was obligated to comply. County Answer Brief at Argument 3; Behringer Answer Brief at Argument D. However, as set forth below, the County and Behringer's arguments are simply not supported by the evidence in the Record.

#### **A. The Board Imposed "Conditions of Approval" in the Resolution Approving the 2009 PUD Amendment**

As a threshold issue, the County and Behringer each claim that the Board's approval of the 2009 PUD Amendment was not subject to any conditions of approval. County Answer Brief at p. 14 ("the Board chose not to impose conditions on the uses-by-right approved as part of the 2009 PUD Amendment" and "what Cordillera characterizes as conditions of approval... were actually approval criteria considered when the PUD Amendment was approved in 2009"); Behringer Answer Brief at p. 20 (the Cordillera Parties "wrongfully conflate 'conditions of approval' with approval criteria").

To the contrary, the Board expressly imposed the following “conditions of approval” in Resolution No. 2010-001, which resolution served as the formal 2009 PUD approval:

**THAT**, this Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document, Eagle County File No. PDA-2563 (attachment ‘A’) be, and is hereby **approved** with the following **conditions**:

- 1) Except as otherwise modified by this development permit, all material representation made by the applicant in this application and in public meetings shall be adhered to and considered conditions of approval.
- 2) Pursuant to the Engineering Department Memorandum dated December 4, 2009, any future development of the Lodge Parcel and Village Center Parcel will be required to comply with the necessary permitting process.

(R.000344-345, bold emphasis in original, underline emphasis added.)

Thus, the Board specifically and expressly mandated that all material representation made by Behringer during the 2009 PUD Amendment process, whether in its application or in public meetings, “shall be adhered to **and considered conditions of approval.**” *Id.*, emphasis added.

Furthermore, this condition of approval was intended to extend into the future and run with the land as evidenced not only by the Board’s imposition of the condition in the formal Resolution, but also the fact that the Resolution was recorded in the Eagle County real property records at Reception No. 20100508. *Id.*

**B. Behringer Made Material Representations Regarding the Impact that the 2009 PUD Amendment Would Have on the Cordillera PUD**

Behringer, through its attorneys, submitted correspondence to the County in November 2009 that made the following material representations, among others, in order to obtain 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.)

Behringer however, argues that these assertions were not material representations associated with Behringer's application but rather legal arguments asserted by its attorneys. Behringer Answer Brief at p. 21 ("These statements were, in effect, legal arguments to explain how the application for the PUD Amendment satisfied the approval criteria; these statements were not material representations regarding factual matters associated with the application").

Behringer's argument in this regard is misleading and disingenuous as evidenced by the representations and statements of CCG's attorneys in the subject letter itself:

- The subject line of the letter from Behringer's attorneys is titled "**Cordillera PUD Application**" (R.000627, emphasis added);
- Behringer's attorneys open the letter by stating "On behalf of our client, Behringer Harvard Cordillera, LLC (the "Applicant"), **we are submitting an application (the "Application") to amend the existing [PUD]** (*Id.*, emphasis added);
- Behringer's attorneys close the letter by stating "As you will see in the Owner Resolution included in the Application package, **the Applicant has authorized this**

**firm**, together with Harry Rosenthal of the Pharos Group, **to act as the Applicant’s agent in connection with the Application**” (R.000628, emphasis added).

Thus, contrary to Behringer’s claim that its attorneys were providing “legal arguments” (Behringer Answer Brief at p. 21), Behringer’s attorneys were actually acting as the agents “submitting” the application on behalf of Behringer. R.000627-628.

Accordingly, the statements of Behringer’s attorneys were material representations that must be considered conditions of approval with which Behringer was obligated to comply. R.000344-345.

**C. The Board’s Interpretation Violates the Conditions of the 2009 PUD Approval**

Despite their prior arguments that no conditions of approval were created by the 2009 PUD approval, the County and Behringer both ultimately argue that the Board’s interpretation did not violate the conditions of approval imposed by Behringer’s representations regarding the impacts of its use on the Parcels. County Answer Brief at p. 15; Behringer Answer Brief at pp. 21-22.

The County claims that “operating a previously approved **use-by-right** cannot affect adjacent properties in a negative way” and that “exercising a previously approved **use-by-right** cannot be viewed as conferring any type of special benefit upon any owner.” County Answer Brief at p. 15, emphasis added. The County’s argument in this regard is wholly dependent on whether the proposed Residential Treatment Facility is a use-by-right. *Id.* It is not. *See* Argument I above. Therefore, the County’s argument fails.

For its part, Behringer claims the Board “relied upon testimony” at the public hearing that the proposed Residential Treatment Facility “would benefit the community” and “would not

negatively impact Cordillera.” Behringer Answer Brief at p. 22, citing R.000126-128. However, the testimony at R.000126-128 is simply the public comment of an individual Eagle County resident and nowhere in the Record does any member of the Board state they “relied upon such testimony” as Behringer claims. *See generally*, R.000001-231. More compelling evidence is that the Cordillera Parties – which include both the Owners Association and the Metropolitan District – don’t believe CCG’s proposed use is intended to benefit the Cordillera community but is instead intended to confer a benefit to a single property owner, namely CCG.

Therefore, contrary to the County and Behringer’s arguments otherwise, the 2009 PUD approval did, in fact, set forth conditions of approval and the Board’s approval of CCG’s proposed use violates such conditions of approval.

**IV. THE BOARD ABUSED ITS DISCRETION WHEN IT DETERMINED THAT THE PUD WAS AMBIGUOUS BUT FAILED TO GIVE EFFECT TO THE LEGISLATIVE INTENT OF THE OPERATIVE PROVISION OF THE 2009 PUD AMENDMENT**

As set forth in Argument 4 of the Opening Brief, the Board abused its discretion when it determined that the PUD was ambiguous but nonetheless failed to give effect to the legislative intent of the operative provision of the 2009 PUD Amendment. Opening Brief at Argument 4.

In response, the County and Behringer both claim that the Board considered and gave effect to the legislative intent of the operative provision of the 2009 PUD Amendment. County Answer Brief at Argument 4; Behringer Answer Brief at Argument B. However, as set forth below, the County and Behringer’s arguments fail upon consideration of the actual evidence in the Record.

**A. The Commissioners Acknowledged that Ambiguities Existed in the Language of the Operative Provision of the PUD**

As set forth in the Opening Brief, the Board acknowledged ambiguities existed in the provision of the PUD that was added in the 2009 PUD Amendment to include medical offices/facilities “limited to clinic and outpatient facilities for non-critical care.” Opening Brief at p. 13.

In response, the County claims the Opening Brief “takes out of context” the comments made by two Commissioners that demonstrate the ambiguity of the PUD. County Answer Brief at p. 16.

To the contrary, when read in context, the comments of the Commissioners demonstrate that ambiguities existed with regard to the use of the term “clinic” in the operative provision of the 2009 PUD Amendment:

COMMISSIONER RYAN: Okay. Thank you. And I've read those affidavits. So that was helpful for you to remind me about that. You know, one comment your expert witness that talked about how clinic is defined by the State of Colorado. And, you know, **I had said to my attorney, But the PUD guide doesn't say that's the definition you're going to use. And, as we've said, 'clinic' is very broad.**

If we use that definition, though, that allows inpatient for 72 hours. **So, again, I just think it – it goes to this point of sort of this ambiguous language and the broadness of 'clinic'.** But, I mean, that helps. But then I think if somebody did get plastic surgery under a medispa model, would they go get some sort of medical procedure and stay at -- and then they could stay at the Spa.

MR. HARSTEAD: Well --

COMMISSIONER RYAN: They could stay at the hotel.

MR. HARSTEAD: And you're absolutely right.

COMMISSIONER RYAN: Okay.

MR. HARSTEAD: The language is ambiguous. And that's why you need to go to the legislative intent. And that's why those affidavits are significant. They'll tell you what the legislative intent was behind the word 'clinic'. And that's exactly why those affidavits are presented to you. It is ambiguous. But you're right. Independent of Colorado regulation, look at your own land use regulations. The addiction treatment center meets the definition of a hospital.

COMMISSIONER RYAN: It's not that clear to me. Can I have a couple more -- do you have some?

CHAIRWOMAN MCQUEENEY: No. I'm trying to move this on because –

(R.000057-58, emphasis added.)

Similarly, the comments of the Commissioners demonstrate that ambiguities existed with the use of the term “outpatient” in the operative provision of the 2009 PUD Amendment:

COMMISSIONER CHANDLER-HENRY: Just that I concur with both the deliberations by Commissioners McQueeney and Commissioner Ryan. And, Commissioner Ryan, **I am in agreement that we should limit the use to outpatient, as has been represented tonight.**

CHAIRWOMAN MCQUEENEY: I believe that's the way that they were representing this tonight. **I don't actually know that that's the only interpretation.** But if that's what they're saying and that's the condition you feel comfortable with, I can definitely live with conditions.

(R.000192, emphasis added.)

Accordingly, by the Board's own testimony, the subject statutory language of the PUD was ambiguous and susceptible to alternate constructions and thus the Board was bound to ascertain the legislative intent behind the 2009 PUD Amendment. *Farmers Ins. Exch. v. Bill Boom Inc.*, 961 P.2d 465, 469-470 (Colo. 1998).

**B. While the Board Received Evidence Regarding the Legislative Intent of the 2009 PUD Amendment, the Board Failed to Actually Consider the Legislative Intent**

The County and Behringer next argue that the Board considered the legislative intent of the 2009 PUD Amendment because the Board accepted evidence and heard hours of public testimony regarding the legislative intent of the PUD. County Answer Brief at p. 16 (“the Board, did in fact, consider over four hours of testimony, much of which focused on the legislative intent of the PUD”); Behringer Answer Brief at pp. 17-18 (the Board considered “several hours of testimony from all parties about the intent of the PUD”).

The County and Behringer’s argument in this regard, however, confuses the receipt of evidence with actual consideration of evidence. In this case, the comments of the Commissioners make clear that, while the Board received evidence of the legislative intent, the Board did not believe it needed to go beyond the four corners of the PUD to actually consider any evidence of legislative intent:

COMMISSIONER CHANDLER-HENRY: Some questions before us about legislative intent, and I do feel like that is very important and spent a lot of time thinking about what was intended by this. Lots of people have spoken passionately about moving into the community and seeing the Lodge there. And when you – when you think of Cordillera, you do think of the Lodge and Spa.

**But to determine legislative intent, I think we have to go back to the PUD, to the 2003 version and the 2009 amendment and look at what the intent was there.** The listed uses in 2003 included professional offices. And now we have a list of 34 uses. I think that we have to assume that that is the legislative intent, is those 34 uses that are in 2009.

(R.000181, emphasis added.)

CHAIRWOMAN MCQUEENEY: It really is the one decision before us that is about the PUD guide and the interpretation of that. I – I do think -- and it was somebody in the audience who used the phrase, The sense of security of the PUD. And **I think that the way you end up with a sense of security to the PUD guide is to interpret it and -- by what words are written down in it, not what people remember of the process...**

... But **what we're stuck with is the actual words that got written down**, the words that were changed in the PUD guide that the HOA -- I'm calling it the wrong thing. You guys had a different acronym for HOA.

(R.000185-186, emphasis added.)

COMMISSIONER RYAN: **And 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. **We have to make our judgments on what is actually in the legal document.**

(R.000188, emphasis added.)

Thus, contrary to the assertions of the County and Behringer, the comments from each of the three Commissioners make clear that the Board considered only the language in the PUD without ever examining the evidence in the Record regarding the legislative intent of the 2009 PUD Amendment.

**C. The Covenants Fail to Provide Evidence that CCG's Proposed Residential Treatment Facility is a Use-by-Right**

The County and Behringer are thus left to argue that the Declaration of Protective Covenants, Conditions and Restrictions (the "Covenants") provided contrary extrinsic evidence that demonstrate CCG's proposed use somehow constitutes a use-by-right under the PUD. County Answer Brief at p. 18; Behringer Answer Brief at p. 17.

The County and Behringer’s argument in this regard is nonsensical. As the County acknowledges, the Covenants pre-existed the 2009 PUD Amendment (County Answer Brief at p. 18), so the Covenants simply do not provide any evidence whatsoever regarding the legislative intent of the 2009 PUD Amendment. Regardless, the PUD and Covenants are separate legal documents – and the uses-by-right on the Parcels are not governed by the Covenants, but rather by the PUD. R.000357-358; R.000363-364.

Therefore, the Covenants fail to provide evidence that CCG’s proposed Residential Treatment Facility is a use-by-right pursuant to the PUD.

**V. THE BOARD EXCEEDED ITS JURISDICTION BY WRONGFULLY AMENDING THE PUD UNDER THE GUISE OF INTERPRETING THE PUD**

As set forth in Argument 5 of the Opening Brief, the Board exceeded its jurisdiction by wrongfully amending the PUD under the guise of interpreting the PUD. Opening Brief at Argument 5.

In response, the County claims the Board did not exceed its jurisdiction by rejecting the need for yet another PUD amendment because: (i) the “PUD does not need to be amended when an identified **use-by-right** is exercised”; (ii) “it would be illogical for the Board to approve a PUD amendment today for a **use-by-right** already approved in 2009”; and (iii) the Cordillera Parties’ argument would “make clear **uses-by-right** somehow conditional.” County Answer Brief at Argument 5 on pp. 19-20, emphasis added.<sup>3</sup>

Each of these arguments by the County are again predicated on the County’s claim that CCG’s proposed Residential Treatment Facility is a use-by-right under the current PUD. *Id.* It

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<sup>3</sup> Behringer did not respond to the Cordillera Parties’ argument that the Board exceeded its jurisdiction by wrongfully amending the PUD under the guise of interpreting the PUD. *See generally* Behringer Answer Brief.

is not because, as set forth above: the PUD’s list of 34 specific “Permitted Uses” fails to include a Residential Treatment Facility (*see* Argument I.A. above; *see also* R.000357-358; R.000363-364); the Board’s attempt to bifurcate CCG’s lodging and medical uses is an artificial distinction inconsistent with the ordinary meaning of a Residential Treatment Facility (*see* Argument I.B. above); and CCG’s proposed Residential Treatment Facility cannot be a use-by-right in the PUD because the proposed Residential Treatment Facility is neither an outpatient facility nor a clinic (*see* Arguments I.C. and I.D. above). The County’s argument thus fails because CCG’s proposed Residential Treatment Facility is not a use-by-right under the current PUD.

The Board therefore exceeded its jurisdiction by wrongfully amending the PUD (to include a Residential Treatment Facility) under the guise of interpreting the PUD. *Anderson v. Bd. Adjust. Zoning*, 931 P.2d 517, 520 (Colo.App.1996)(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).

## **VI. THE BOARD’S INTERPRETATION IS NOT MANDATED BY FEDERAL LAW**

Finally, Behringer claims that the Board’s interpretation was mandated by federal antidiscrimination laws, namely the federal Fair Housing Act (“FHA”) and Americans With Disabilities Act (“ADA”). Behringer Answer Brief at Argument C.

Behringer’s assertion is simply false and underscores the simple fact that the Board’s interpretation was tainted by the fear of a lawsuit from Behringer and CCG.

CCG’s proposed use – which seeks to segregate the facility from the greater community – is simply not consistent with the purposes of the FHA and the ADA, which are intended to integrate those with disabilities into the community. R.000716-717. Moreover, the Board made

clear that any interpretation it made, whether in favor or against Behringer/CCG, would not have been motivated by discrimination. R.000005 (“the Board will not be considering and will not give weight to any testimony or e-mails that are discriminatory.”). Thus, the Board would not have been liable for disparate treatment or disparate impact under the FHA and ADA. *See Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City*, 685 F.3d 917, 919-921 (10<sup>th</sup> Cir. 2012)(claim alleging disparate treatment requires direct evidence that decision was discriminatory and claim alleging disparate impact requires showing that specific policy caused disparate effect without legitimate nondiscriminatory reason); *see also McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

In support of these conclusions, the Board was presented with the sworn Declaration of Michael Allen, a nationally-recognized disability rights attorney. R.000714-727. As Mr. Allen opined, “so long as [the Board’s] action is not motivated by discrimination, and they do not depart from normal . . . review criteria, the [Board] can, without FHA or ADA liability, reverse the Director’s interpretation. . .” R.000720.

Furthermore, as Mr. Allen opined, “it is not as if having a disability or providing services to people with disabilities” entitles one to a “Go Free Card” with respect to zoning and land use regulations. R.000720; *see also McKivitz v. Township of Stowe*, 769 F.Supp.2d 803, 826-827 (W.D. Penn. 2010) (holding that because “group residences” are permitted in other zoning districts within the Town there was no violation of FHA). Rather, as Mr. Allen opined, “CCG must conform to the underlying requirements of the applicable land use regime which, in this case, is the PUD and the rules and procedures applicable to County interpretation and review of same.” *Id.* Therefore, contrary to Behringer’s assertions, the FHA and ADA do not mandate

CCG's proposed use is a use-by-right simply because other residential uses-by-right exist in the Cordillera PUD. *Id.*; *see also* County Regulations at Article 3, Table 3-300 (which authorizes Group Homes by Special Review in 8 out of 11 zoning districts in the County).

Ultimately, Behringer and CCG hijacked the important FHA and ADA civil rights laws to use as a sword, rather than a shield, in order to force the Board to side in CCG's favor. R.000657; *see also* R.000791-792. Behringer and CCG's scare-tactics ultimately worked, as the Board's decision evidenced a clear motivation to avoid potential liability. R.000190 ("And it's for this reason our attorneys told us we could be subject to an ADA lawsuit that could cost the County millions.").

The FHA and ADA, however, simply do not mandate an interpretation that CCG's proposed Residential Treatment Facility is a use-by-right as Behringer demands.

### **CONCLUSION**

WHEREFORE, for the reasons set forth in the Opening Brief and this Reply Brief, the Cordillera Parties respectfully request that this Court therefore reverse the Board's interpretation.

Respectfully submitted on July 7, 2017.

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*s/ Lew M. Harstead*  
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**CERTIFICATE OF SERVICE**

I certify that on July 7, 2017 the foregoing was served via electronic service to the following:

| <b>Party Name</b>                | <b>Attorney Name</b>   |
|----------------------------------|--|
| Barbara and Jack Benson          | Terence Patrick Boyle (Boyle Apelman PC)   |
| Eagle County Colorado            | Beth Ayres Oliver (Eagle County Attorneys Office)<br>Bryan Robert Treu (Eagle County Attorneys Office) |
| Behringer Harvard Cordillera LLC | Sarah J Baker (Sarah J Baker PC)   |

*s/ Trina Rioux*

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Trina A. Rioux