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| **DISTRICT COURT, EAGLE COUNTY, COLORADO**<br>885 Chambers Ave., P.O. Box 597<br>Eagle, CO 81631<br>(970) 328-6373 | DATE FILED: September 15, 2017<br>CASE NUMBER: 2016CV30361 |
| **Plaintiffs:**<br>BARBARA AND JACK BENSON, CRAIG FOLEY and GREG JOHNSON, CORDILLERA PROPERTY OWNERS ASSOCATION, INC., and CORDILLERA METROPOLITAN DISTRICT<br><br>v.<br><br>**Defendants:**<br>EAGLE COUNTY, acting by and through its BOARD OF COUNTY COMMISSIONERS and Intervenor BEHRINGER HARVARD CORDILLERA LLC | **▲COURT USE ONLY▲**<br><br>Case Number:<br>**2016 CV 30361**<br>(Consolidated with Case No. 16 CV 30363)<br>Div. 1 |

**ORDER**
**AFFIRMING THE EAGLE COUNTY BOARD OF COUNTY COMMISSIONERS' INTERPRETATION OF THE CORDILLERA PUD PURSUANT TO C.R.C.P. 106**

THIS MATTER comes before the Court on a Complaint filed by Plaintiffs Barbara and Frank Benson, Craig Foley and Greg Johnson (collectively the "Benson Plaintiffs") in Case No. 16CV30361, and on a Complaint filed by Plaintiffs Cordillera Property Owners Association (the "CPOA") and the Cordillera Metropolitan District (the "CMD") (collectively the "Cordillera Plaintiffs") originally in Case No. 16CV30363. Both are requests for judicial review under C.R.C.P. 106(a)(4). The two Complaints were commenced in different proceedings; however, on January 20, 2017 the Court consolidated the two lawsuits into the instant action.

In a September 20, 2016 final, quasi-judicial action, the County Board of County Commissioners (the "Board") ratified, with modification, the Eagle County Community Development Director's (the "Director") final interpretation of certain portions of the Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document (the "2009 PUD"). The Board's interpretation was that a private owner's proposed use, as modified by the Board, was a use-by-right pursuant to the 2009 PUD.

The Benson Plaintiffs and Cordillera Plaintiffs each filed an Opening Brief on April 21, 2017. Eagle County, acting through its Board of County Commissioners, (the "Eagle County Defendant") filed an Answer Brief on June 2, 2017 and an Amended Answer Brief on June 16, 2017. Intervenor Behringer Harvard Cordillera, LLC ("BHC") filed an Answer Brief on June 2, 2017 and an Amended Answer Brief on June 16, 2017. The Benson Plaintiffs filed a Reply Brief on July 6, 2017 and an Amended Reply Brief on July 7, 2017. Cordillera Plaintiffs filed a Reply Brief on July 7, 2017.

The Court, having fully considered the Briefs, Record, and being otherwise fully advised of the merits, hereby makes the following FINDINGS OF FACTS, CONCLUSIONS OF LAW and ORDERS:

## I. FACTUAL FINDINGS

Cordillera is a community of luxury, residential homes developed in Eagle County, Colorado. At issue are two parcels within Cordillera, privately owned and commonly known as the Lodge Parcel and the Village Parcel (also referred to herein as the "Property"). The Lodge Parcel was improved by a hotel-like 56-room Lodge and Spa (the "Lodge"). Cordillera property owners, homeowners and their guests have historically had access to discounted Lodge amenities via annual membership fees; these include a restaurant, a golf course, tennis courses, and spa. The Lodge also allowed non-member residents and the public access to the Lodge to use the restaurant, spa and hotel rooms, albeit at non-discounted rates.

Traditionally, the Lodge has been a selling point to potential buyers of private residences within the community. In the Lodge's early days, it was able to support operation of the hotel, and other amenities through membership fees and operational income. The Village Parcel was planned as a focal point/social gathering point for the community. However, it has never been built out and generally consists of open space, tennis courts and hiking paths, which all residents and their guests currently enjoy.

In 2007, BHC purchased the Lodge and Village Parcels. From the outset of BHC's ownership, the Lodge was not profitable, in part because other parts of the community were developed and now provided similar amenities. In 2008, for example, the Lodge suffered a reported net operating loss of several million dollars.

By 2009, only about 53 residents held memberships at the Lodge and hotel occupancy had dwindled to approximately half. These operational challenges threatened solvent financial operation of the Lodge.

In early 2009, BHC submitted an application for amendment to the Cordillera PUD to define uses of the Property as stated herein and add additional uses to the Lodge, though not additional uses within the Cordillera PUD as a whole. The PUD is a separate planning document and supersedes the County's Land Use provisions to the extent it contains more specific land use regulations for the Cordillera community. The Board rules on all changes to the PUD and polices any conformity complaints. The PUD amendment process, typically required for any major change, requires a full public notice and hearing. Any major change also required approval of the CPOA, and consultation with the CMD prior to submission to the Board.

BHC's application proposed treating the two Parcels as one unit for the purposes of future development, subjecting the two parcels (the Village and Lodge) to one, interchangeable density standard. BHC also proposed a list of thirty-four uses-by-right, applicable to both Parcels, and that would replace the two categories of uses for the Lodge Parcel and the twenty-one uses for the Village Parcel.

One of the uses proposed to be added to the Lodge Parcel was "Medical Offices/Facility," use language not previously or specifically spelled out as an available use for either the Lodge or Village parcels, though similar language was specified on the Village parcel. Throughout the amendment process BHC assured Cordillera property owners that none of these changes would make substantive changes to the existing Cordillera Subdivision Tenth Amended and Restated Planned Unit Development Control Document (the "2003 PUD") density or property uses.

The CPOA, having veto power over any proposed amendment to the PUD, objected to the addition of a "Medical Offices/Facility" use, apparently viewing it as overbroad. CPOA Complaint, p. 4, ¶25. The CPOA, in consultation with its staff and lawyers, re-wrote the provision and provided the following changed language to BHC:

> "14. Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, without limitation, outpatient plastic surgery and other cosmetic procedures." CPOA Complaint, p.4, ¶ 26.

The BHC representatives acceded to this change. CPOA found the amendment to be acceptable, in the best interest of the community, and consistent with the character of Cordillera CPOA Complaint, *id.* Presumably, by suggesting and accepting this language, the CPOA found this use to be consistent with existing uses on the PUD as a whole. This factor becomes critical in the Court's analysis. Accordingly, the Lodge PUD provisions that had previously specified nine ancillary uses to the Lodge as one use, was modified to allow any one of thirty-four, stand-alone uses. After the CPOA and CMD signed off on the proposed PUD amendments, the use provisions were re-written, to, among other things, list thirty-four alternative, stand-alone uses, including the modified "Medical Offices/Facilities", as uses-by-right for both Parcels of the Property.

BHC submitted the complete application for the PUD amendment process to the Eagle County Board of County Commissioners (the "Board"). Official notice was given to the public and mailed to each Cordillera resident. A formal amendment process was held, involving notice and hearing, as required by the PUD for major changes. After a public hearing the Board approved the 2009 PUD Amendment application. As approved, the 2009 PUD superseded the 2003 PUD and became the community's primary land-planning document.

In late 2013, BHC put the Property on the market. After approximately thirty months, Concerted Care Group ("CCG") was the only serious potential buyer of the Property.[1] In 2016, CCG entered into a contract to purchase the Lodge and Village Center Parcels from BHC. In early 2016, CCG disclosed its intent to use the Property for a clinic for non-critical, inpatient treatment of a variety of addictive conditions, including, but not limited to, eating disorders, alcoholism, chemical dependency, and behavioral health conditions, as well as a residential rehabilitation component with a focus on health and fitness, including fitness, yoga, nutrition and recreation (the "Proposed Use"). R.0233; R.0009:13-20. Prior to closing the deal, CCG wanted assurances that this Proposed Use was allowed under the 2009 PUD.

Accordingly, in March 2016, CCG sought to obtain a formal County interpretation on its behalf regarding its Proposed Use. This was done via a formal letter to the Director. Agents of BHC and CCG met multiple times with the County staff to fully describe and tailor the Proposed

[1] On August 7, 2017 Attorneys for BHC provided the Court notice that the sale of the Property, the subject of the Board's Resolution No. 2016-079 on appeal in this case, was completed. The sale of the Lodge was recorded with the County on August 2, 2017.

Use. In response to questions and comments, those agents provided the County with numerous documents, descriptions and assurances. R.00233; R.0009:21-25; R.0010:1-3.

On July 11, 2016, Robert Narracci, Director of Community Planning for Eagle County, re-issued his formal interpretation of the use provisions of the Property in response to the formal written request by BHC, then-owner of the Property.[2] The Director interpreted the 2009 Cordillera PUD to allow an inpatient clinic for medical addiction treatment with separate residential rehabilitation rooms on the Property as a use-by-right (the "Director's Interpretation"). R.0233; R.0009: 21-25; R.0010:1-3.

The Cordillera Plaintiffs appealed the Director's Interpretation to the Board pursuant to Section 5-2400 of the Eagle County Land Use Regulations ("ECLURs"). R.0258-270. The Benson Plaintiffs did not appeal. At the public hearing on the appeal held September 20, 2016 after notice and public comment, the Cordillera Plaintiffs, as well as members of the public and other Cordillera residents, participated and presented their concerns.

During the hearing the Board reviewed the submissions of the Director. R.0233, R.0234, R.0236-257. It also considered the Cordillera Plaintiffs' presentation and public input. R.0258-318, R.0319-320, R.0321-730, R0731-765. The Board listened to the presentation made by Intervenor BHC and CCG. *See* R.0766-784; R.0785-810; and R.0811-854. In addition, the Board reviewed over 500 pages of submittals, including more than 120 letters and emails from Cordillera community members and listened to more than 4.5 hours of testimony, many making arguments similar to those posed by Plaintiffs herein prior to rendering its determination. R.0001-231; R.0860-1160. Those documents and transcripts comprise the "Record" herein.

At the conclusion of the public hearing, the Board, with the modification of precluding inpatient treatment in the clinic, orally affirmed the Director's Interpretation. The Board concluded that the 2009 Amendment authorized the Lodge owner to effectively eliminate and replace the Lodge by any one of the other thirty-four so-called "standalone" uses. R.0181-0193. The Board indicated that its decision would be encapsulated in a later-issued written resolution. R.0193: 12-16.

On October 11, 2016, the Board adopted Resolution 2016-079 (the "2016 Resolution") determining that the "Medical Office/Facility," Use and Residential Use, with the above

[2] The Director issued the original determination letter on June 1, 2016, but reissued his same determination letter on July 11, 2016 when it was brought to the Director's attention that per the land use regulations only a Cordillera property owner could request such an interpretive determination. R.0010: 4-11.

described modification, allowed the Property owner to in effect eliminate the historical use of the Lodge and Spa at Cordillera and replace it with an outpatient clinic and residential facility. R.0855-859

On November 8, 2016, the Benson Plaintiffs filed their Complaint in Eagle County District Court in Case No. 16CV30361. The Benson Plaintiffs' First Amended Complaint, filed on March 13, 2017, made claims pursuant to C.R.C.P. 106 and C.R.C.P. 57(a). The Cordillera Plaintiffs filed their Complaint in Eagle County District Court in Case No. 16CV30363, also on November 8, 2016, and claimed relief based solely on C.R.C.P. 106(a)(4). As indicated above, the matters were consolidated by Order of the Court. The Eagle County Defendant filed a Motion to Dismiss both the Benson Plaintiffs Rule 106 and Rule 57 claims. On May 26, 2017 the Court granted Defendant's Motion in part and denied in part, leaving only the Rule 106 claim.

Plaintiffs, Defendant and the Intervenor have fully briefed this matter. Plaintiffs allege that the Board's determination, ratifying the Director's interpretation, with the modification that the clinic may only be for outpatient use, is an erroneous, not supported by the record, arbitrary and capricious decision, or one beyond the scope of the Board's jurisdiction. Benson Plaintiffs Complaint, ¶¶ 69-71; Cordillera Plaintiffs Complaint, ¶¶ 59-64. All Plaintiffs request the Court reverse the Board's determination.

After careful consideration of the entire Record, the Court **AFFIRMS** the Board's Interpretation as set forth below.

## II. STANDARD OF REVIEW FOR C.R.C.P. 106(a)(4)

Review of quasi-judicial actions of a Board of County Commissioners pursuant to C.R.C.P. 106(a)(4) is "limited to a determination of whether the [body] has exceeded its jurisdiction or abused its discretion, based on the evidence in the record." In determining whether there was an abuse of discretion, courts may consider whether there was a misinterpretation or misapplication of the governing law. C.R.C.P. 106(a)(4); *Sierra Club v. Billingsley*, 166 P.3d 309, 311–12 (Colo. App. 2007) (citations omitted). Zoning ordinances are subject to the general canons of statutory interpretation and three basic principles are especially applicable herein regarding their proper construction:

1) Courts ascertain and give effect to the intent of the legislative body, and must refrain from rendering judgments that are inconsistent with that intent. *Billingsley, id.*, at 312.

2) To determine legislative intent, the court looks 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. Resorting to other evidence is not allowed. A court may presume that the legislative body meant what it clearly said. The Board's interpretation must be accepted if it has a reasonable basis in law and is warranted by the record. *Billingsley, id.*, (citing *City of Colo. Springs v. SecurCare*, 10 P.3d 1244, 1248-49 (Colo. 2000).

3) If the language of an administrative rule is clear and unambiguous, the language should not be subjected to a strained or forced interpretation. If it is ambiguous or unclear, the courts still must give great deference to an agency's interpretation of a rule it is charged with enforcing. *SecurCare, id.* The agency's interpretation will be accepted if it has a reasonable basis in law and is warranted by the record. *Rivera-Bottzeck v. Ortiz*, 134 P.3d 517, 521 (Colo. App. 2006).

In a Rule 106(a)(4) proceeding to determine if the Board abused its discretion, the reviewing court considers whether the governmental body's actions are manifestly unfair, or the product of misconstrued or misapplied law. *Bd. of Cnty Commr's of Larimer Cnty. v. Conder*, 927 P.2d 1339, 1343–44 (Colo. 1996) (citing *Van Sickle v. Boyes*, 797 P.2d 1267, 1274 (Colo.1990)). Whether a governmental body's application or interpretation of law or its own standards, rules, and issuance of a resolution is beyond its jurisdiction or an abuse of discretion, both are questions of law that the court reviews *de novo*. *City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008).

## III. ANALYSIS

There is significant overlap within the arguments made by the two sets of Plaintiffs. The Plaintiffs make slightly different legal arguments, albeit raise generally similar issues regarding the putative Board errors. The Court first analyzes the arguments under the rubric of the joint issues that both parties have raised. Where distinct arguments are made, the Court has divided into two parts, denominated as the Cordillera Plaintiffs or the Benson Plaintiffs respectively, for clarity. Where similar arguments are made, no such distinction is made. There is also overlap within the separate arguments made by each Plaintiff. As such, in certain areas the Court's findings do not specifically track the headings as set forth by the Plaintiffs and in an attempt to be thorough in certain areas the Court revisits arguments previously discussed. Finally, the Court discusses in a separate section the penultimate conclusion of the competent record in support for the Board's decision.

## A. The Board's Determination that the Proposed Use is a Use-by-Right Pursuant to 2009 PUD Provisions Is Not Reversible Error

### 1. Cordillera Plaintiffs' Arguments

The Cordillera Plaintiffs first argue that the Board's adoption, with modification, of the Director's Interpretation cannot stand as that determination is contrary to the express language of the Cordillera PUD. The Court does not agree.

In construing local zoning regulations, the Court must ascertain and give effect to the intent of the legislative body. To determine this intent, the Court looks first to the plain language of the ordinance. *City of Colo. Springs v. SecureCare*, 10 P.3d 1244, 48-49 (Colo. 2000). If a court is able to give effect to the plain and ordinary meaning of words used by the legislature, the ordinance must be construed as written. *Id.* Likewise, the legislative body is presumed to mean what it says and to understand the legal ramifications of any changes it makes. *See State v. Neito*, 993 P.3d 493, 500 (Colo. 2000).

The record reveals that in the language for the 2009 PUD Amendment, the qualifying phrase is as follows:

"Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including without limitation, for outpatient plastic surgery and other cosmetic procedures." §2.01.1 (14).

The Cordillera Plaintiffs assert that since an inpatient clinic that has a residential rehabilitation facility is not listed nor contemplated as one of the thirty-four uses of the Lodge in the 2009 PUD, this interpretation is erroneous as a matter of law. The Court disagrees.

The short answer is that the appropriate analysis is not whether the words describing the Proposed Use are enumerated within the 2009 PUD but whether the Proposed Use fits within these operative words in the PUD: "clinic," "and outpatient facilities," and "non-critical care." The Court analyzes each of these words and phrases below.

As none of these words is defined in the PUD or the County land use code, the Court must ascertain the plain and ordinary meaning of each as did the Board.

As presented at hearing, the Merriam Webster dictionary describes a clinic as a facility for the diagnosis and treatment of outpatients (R.0131), as well as a facility that offers professional services or consultations R.0142. A generally accepted meaning of the word "clinic" is a place of outpatient non-ambulatory care (R.0015) in which outpatients are given medical

treatment or advice. R.0132:1-2. Defined most broadly, a "clinic" is a group of similar treating professionals working together. R. 0014-15.[3]

In the public hearing the CCG Representative testified: "You can see the defined areas of residential and the defined area of the clinic. . ." He concluded, "the clinic portion . . . will include . . . examination rooms, doctors' offices, administrative offices and storage, as well as individual and group counseling rooms for talk therapy." R. 0081: 21-25; R. 0082: 1-9.

The Merriam Webster Dictionary defines "outpatient" to mean medical treatment in a clinic setting where patients are not required to have medical treatment overnight. "Outpatient," http://www.merriam-webster.com/dictionary (last visited 9/7/2017).[4] The record supports that CCG proposed such treatment here. R. 0178: 7-11. The Director testified: "This was not presented as an arrangement where patients are staying overnight in hospital type rooms." R.0015. The record contained evidence that all treatment associated with the Proposed Use would take place in a clinical setting. R. 0114; R.0178:7-11.

The Merriam Webster dictionary defines "critical care" 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. "'Critical'" and 'care'", http://www.merriam-webster.com/dictionary (last visited 9/7/2017). Counsel for CCG testified, "CCG seeks to operate a clinic - not a hospital - in a residential treatment facility." R.0091. She contrasted critical care to non-critical care and described how the proposed facility would provide the latter. CCG's National Medical Director opined, "Contrary to the [letter] of Dr. Lawrence Brooks, who submitted an affidavit on behalf of those in opposition to the Lodge, we will not be providing critical care." R. 0083: 16-21.

Likewise the Director explained that: "No critical care treatment was proposed. CCG has since provided applications for licensing [for co-substance use disorder license application] they're seeking as evidence that no proposed treatment would fall into the generally-accepted definition of critical care." R0014. The Board accepted these positions and evidence.

After considering voluminous amounts of information from the property owner about the potential use, the Board did not factually find the proposed use to be a hospital, group home or

[3] The Court will note that references to the Merriman-Webster Dictionary were stricken from BHC's initial Answer Brief as they were used to define different terms and were not part of the record.

[4] Despite striking the dictionary references from the BHC Answer, the Court uses this as a source for plain meaning. Court found this appropriate as for at least one other term it was used as a source during the hearing.

Acute Treatment Unit as argued by the Cordillera Plaintiffs. R.0856; R.0009; R.0312. It also decided that that only outpatient, not inpatient, clinical use was appropriate. The Board's decision and factual findings in this regard is amply supported by the record, the language of the PUD and acceptable plain meaning of the language of the PUD. There is a reasonable basis in the law for this determination and the Court finds no misapplication of the law.

The Cordillera Plaintiffs next argue that the Board's determination to adopt, with modification, the Director's interpretation that a standalone clinic is a use-by-right for the Lodge Parcel is reversible error as a matter of law because an approved use can only be ancillary to use of the Lodge, it cannot replace the Lodge. The Court disagrees.

The Court finds that in the precursor 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" and then delineated nine other specified and allowed uses with the Lodge. R.0441. It may have been possible to interpret the 2003 language to only provide for use ancillary to the Lodge. However, that language was purposefully changed. The Court cannot agree that those changes are irrelevant or are properly read out of the PUD.

After careful review of the PUD provisions at issue, the Court concludes the PUD no longer contains any language that arguably limits only ancillary uses-by-right to the Lodge Parcel. The language CPOA approved and drafted replaced what might have been previously construed as uses ancillary to the current operation of the Lodge with the current language which included:

"Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including without limitation, for outpatient plastic surgery and other cosmetic procedures."

In reviewing the language of the PUD for its plain and ordinary meaning, the Board concluded the thirty-four current uses-by-right are now standalone uses that are not dependent on or ancillary to the continuation of the historical Lodge operations. An established rule of legislative construction is that the legislature is presumed to act intentionally and purposefully when it omits it in a future promulgation language that had previously been present. *See BFP v. Resolution Tr. Corp.*, 114 S. Ct. 1757, 1761 (1994); *Romer v. 17 Bd. of Cnty Comm'rs of County of Pueblo*, 956 P.2d 566, 567 (Colo.1998) (absence of specific language is meaningful).

The record indicates that in determining the plain meaning of the 2009 Cordillera PUD, the Board correctly balanced the rights of a private property owner to use its property as it desires, with the rights of other property owners and residents subject to the PUD. The Board's determination that the changed language was rightly interpreted to create standalone uses that may exist instead of the Lodge, is consistent with the amended language and therefore not arbitrary. It is important to note that it was a clear intent the PUD amendment would permit uses existing on the Village Parcel to now apply to the Lodge Parcel. It was in no way limited to permitted uses on the Village Parcel that were ancillary to the Lodge. The amendment was broader than that.

Cordillera Plaintiffs next argue that the Board acted in excess of its jurisdiction in construing the language to allow anything other than a cosmetic medi-spa or other cosmetic clinic. The Court disagrees.

This argument makes little sense in light of the addition of the phrase "without limitation." That phrase can only be interpreted to mean that the re-written use does not incorporate terms of limitation. It is telling that CPOA did not restrict this proposed language to "medi-spas" although it could have easily done so when it rewrote the language of Use No. 14 if that was the accepted intent; what it did instead was focus its re-write on defining Medical Office/Facility qualifying medical with only "non-critical care," and "outpatient facilities."

As indicated above, the phrase "including but not limited to the following" has been replaced with "including without limitation." One cannon of proper construction requires all words and phrases to a statute law, ordinance or other legal document to be given effect and purpose. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The absence of particular language is usually considered an indication of legislative intent, not a mere oversight. *Specialty Restaurants Corp. v. Nelson,* 231 P.3d 393, 397 (Colo. 2010). Thus, the Court concludes that the "Medical Office/Facility" use proposed by BHC as amended by the CPOA in 2009 and inserted into the 2009 PUD does not preclude an outpatient clinic for addiction treatment if that is encompassed within the "clinic" and "outpatient facilities for non-critical care" language. The Board found that it was encompassed in that language and the Court finds no error.

The Cordillera Plaintiffs assert next that since an inpatient clinic that has a residential rehabilitation facility is not an outpatient use, and was not contemplated as one of the thirty-four uses of the Lodge in the 2009 PUD, this interpretation is erroneous as a matter of law. The Court again disagrees.

The plain language of the PUD explicitly provides for a non-medical, residential facility. The Board modified the BHC request, to require the "Medical Office/Facility" to operate as a clinic only on an outpatient basis. The Board determined that CCG's proposal for patients to stay in lodging rooms and receive outpatient clinical treatment was not within that use but rather a non-medical, multi-family residential use. R. 0856. The PUD at section 2.01.1 lists thirty-four standalone uses for both the Lodge and Village Parcels. Section 2.01.1 and 3.01.1. R.0357-358; R.0363-364. Both Sections expressly permit the following relevant residential uses:

> Clubhouse and Lodge building or buildings with related facilities; Lodging and accommodations; Residential – Single-family; residential – townhome; residential - multi-family; residential – condominium and/or fractional interest ownership; Meeting rooms; Lodge and conference facility, including hotel uses; Lodge suites; Food service facilities; Education facilities; Laundry and cleaning facilities; Service commercial; Reception desk and lobby along with related facilities; and Professional Offices. *See* 2009 PUD, Section 2.01.1 and 3.01.1.

There was competent evidence at hearing that there would be separate residential portions of the Property that would be used in a manner identical to the use of the then existing hotel rooms and that as such a separate residential use was also encompassed in the 2009 PUD. R. 0081-82. These residential portions would be separate and distinct from the treatment facilities. During the hearing a CCG Representative stated: "[T]here is a separate clinic portion. There's a separate residential portion. While they may be connected with, you know, walkways and hallways . . . There's a separate and distinct clinic portion, which is where the doctors' offices are . . .[a]nd there are separate residential buildings . . . The clinic operations would be the same as a typical doctor's office, you know, nine to five-type hours." R.0108 - R.0109. "All the treatment takes place in the clinic . . . . no treatment is taking place in a residential unit or room." R.0114. The CCG Representative concluded, "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, is not in their residence." R.0178. Therefore, the Court concludes that a use of residential facilities as multi-family or as fractional interest ownership is within the PUD language. The determination was supported by competent evidence in the record as stated above and was not an abuse of discretion by the Board.

Finally, the Cordillera Plaintiffs asserts that the Board misconstrued CCG's Proposed Use by analyzing the clinic and residential facility as separate and distinct uses, arguing that the Proposed Use was for a single facility. The Court does not find this argument persuasive.

This case concerns a request for an application for an interpretation of a previously Approved Use articulated in the 2009 PUD. The record supports that the Board understood that it was determining whether those Approved Uses could be used in two separate operations. As noted above, CCG testified that the use would contain a separate clinic portion and a separate residential portion" R.0108. The Representative concluded, "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.

There is nothing in the PUD that prevents the owners operation of several distinct uses on the Lodge Parcel, such as the operation of a clinic, and a separate residential component. No party disputes that the intent of the Amendment was to treat the two Parcels as one density unit and place uses on both that captured previous understandings of how future development might take place on them. The record supports this construction. The Board determined a clinic providing outpatient care, along with a separate residential facility were both approved as uses-by-right under the PUD (henceforth the "Approved Use"). R.0855-859.

The Court finds that the Approved Use (the modified interpretation) meets the plain meaning of a standalone "clinic" and "outpatient facility for non-critical-care", and a separate facility for "multi-family residential" and that such separate and distinct uses are permitted under the PUD. The record supports the Board's decision, and the Court perceives no error or misapplication of the law.

**2. Benson Plaintiffs Arguments**

The Benson Plaintiffs also argue that the Board erred in its interpretation because the 2003 PUD can only be read as approving uses ancillary to the Lodge. Therefore, the amended list of uses in 2009 PUD cannot properly be interpreted as providing any use separate from the Lodge. The Court finds that argument to be non-persuasive.

As stated above, 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 . . . ." and then defined the nine other allowed uses.

R.0441. This language might have had some force in support of an argument that the then nine additional uses were ancillary to Lodge purposes.

However, that language no longer exists. As discussed above, 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. Instead the PUD was amended to provide for thirty-four uses, including the medical facility use, which read, in pertinent part, "a clinic and inpatient facilities that include, without limitation . . ." Again, it is telling that this language was proposed and approved by the CPOA. The absence of particular historical language is usually considered an indication of legislative intent, not a mere oversight. *See Specialty Restaurants Corp. v. Nelson,* 231 P.3d 393, 397 (Colo. 2010). The Court will uphold an interpretation of legislative language that avoids absurd or illogical results. *Qwest Corp. v. Colo. Div. of Prop. Taxation,* 2013 CO 39, ¶ 16, 304 P.3d 217.

Accordingly, in reviewing the Board's interpretation, the Court concludes that it applied the plain and ordinary meaning of the language of the 2009 PUD language to conclude that the now thirty-four current uses-by-right are standalone uses, not dependent on or ancillary to the continuation of the historical Lodge operations. There is nothing in the existing PUD which indicates otherwise. The Court rejects the Benson Plaintiffs' urged interpretation since, as indicated above, the absence of specific language is generally meaningful and the assigned meaning should "strive to interpret [the legislative language] in a manner that avoids rendering any provision superfluous." *Qwest Corp. v. Colo. Div. of Prop. Taxation,* 2013 CO 39, ¶ 16, 304 P.3d 217; *See also, Romer v. 17 Bd. of County Comm'rs of County of Pueblo*, 956 P.2d 566, 567 (Colo.1998).

The Benson Plaintiffs next argue that the Board's Interpretation is also erroneous because it violates the Eagle County Land Use Regulations (the "ECLUR"), and state zoning provisions. The Court finds this factually and legally inaccurate.

The Court finds that contrary to the Benson Plaintiffs' argument, the ECLUR does not contain a definition for "clinic," "outpatient," or "residential rehabilitation" so the Board's interpretation could not violate the ECLUR. The Court review of the PUD reveals that there are also no gap-filler definitions in the 2009 PUD from which to extrapolate these words that are used. In the absence of a definition of these operative terms in either the 2009 PUD or the ECLUR, the Board was entitled to rely upon the plain meaning of each word, based on the

commonly accepted meaning of each and in the context of the entire phrasing of Use No. 14. R.0856. Acceptable plain meanings are discussed above and the Court therefore does not find the Benson Plaintiffs' argument persuasive.

However, the Benson Plaintiffs next assert that ECLUR Chapter 2, Article 5- 220(B)(1) expressly requires, as a mandatory first step, that an interpretation of a zoning regulation (like the 2009 PUD), or an amendment thereto, begin from the "purposes for which the regulation was initially adopted." The Benson Plaintiffs argue that since the Board did not discuss the 2009 purpose in its oral or written ratification, it failed to comply with that requirement, and abused its discretion. The Benson Plaintiffs appear to specify that the critical words reflecting true purpose to be "resort residential." The Court cannot agree that consideration of identity of the purpose must be construed so narrowly, as a matter of law.

The Court finds no record evidence that the Board ignored the 2009 purpose; instead it is clear that the Board simply did not conclude its analysis there. What the Board said on the record, as well as by its actions, 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). The most favorable inference that can be made from the record is that the Board spent a great deal of time actively hearing and responding to well-prepared presentations and comments during the 4.5 hour public hearing. The Board reviewed an enormous amount of evidence, both pro and con, prior to making its 2016 determination. Additionally, as a factual matter, the Approved Use clearly has a "resort residential" element– stays at the Lodge are planned to be approximately $60,000 per month and to offer resort-like recreation to those served.

The Court cannot on this record state that such the Board's modified ratification of its staff's interpretation was manifestly unfair or arbitrary as a matter of law. 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). The Court does not find the Board's failure to reference a "2009 purpose statement" after such a thorough perusal of community input an arbitrary and capricious determination, or one in excess of the Board's jurisdiction. Further and as is addressed later herein, by accepting the uses-by-right in the 2009 PUD with approval of the CPOA, it was determined and agreed in 2009 the uses by right were consistent with the purposes of the PUD.

Finally, the Benson Plaintiffs also cite as error all other Board actions that do not revisit the amendment process in 2009 – including the Notice, the Application, the statements made in 2009 by BHC, etc. The Court disagrees that this refusal is in excess of the Board's jurisdiction or makes its determination arbitrary.

It is clear from the record that the 2009 Purpose Statement was subsumed into the 2009 Amendment, and that relevant procedural requirements were met during the 2009 Amendment process. There is no way that every possibility allowed under this language could have been anticipated and vetted. However, there were checks and balances built into the Amendment process including review by the CPOA and CMD. By approving the 2009 Proposed Amendments, the CPOA and the Board agreed all the enumerated uses met the needs of the community and were consistent with its aesthetic values and the 2009 Purpose Statement.

The claim made now that the Board's interpretation of this same language cannot stand against this "legislative history" in inapposite. First, since the Board did not find the instant language used in the PUD ambiguous, combing through 2009 "legislative history" as to its meaning would be inappropriate. The Court must discern the intent of the parties and the meaning of the provision from the four corners of the legislative provisions unless they are ambiguous. Only if the legislation appears to be capable of more than one meaning would the court turn to extrinsic evidence. *Am. Family Mut. Ins. Co., v. Hansen*, 375 P.3d 115, 117 (Colo. 2016).

Second, the protests that due process was lacking seven years ago, is both unsubstantiated, and extremely untimely. The ultimate language itself was burnished with input from and the drafting of the precise language was done by the CPOA, the CMD, Board staff and their attorneys with notice to all Cordillera property owners. The Court continually emphasizes that the CPOA and the CMD were required and did play an active role in the 2009 Amendment which mitigates any due process concerns. The CPOA and CMD agreed to these uses on the Lodge Parcel.

There is no way that every possibility allowed under this language could have been anticipated seven years in advance. Nor need it be. The additional language added by the CPOA broadened and did not narrow the possibilities. Thorough vetting was done, and the opportunity to make the language very specific was available. That said, the history that was very clearly considered at the public hearing suggests constructive and actual notice of the precise language

used, and even the most cursory review should have made clear that the proposed amendment re-denominated nine ancillary uses-by-right into thirty-four standalone uses for the Lodge Parcel.

The public was also on notice that, among other things, the amended permitted uses would be the same for the Lodge Parcel and the Village Center Parcel, incorporating everything previously approved on one or the other, and that community use of the Lodge was becoming potentially more limited. The argument that the Plaintiffs had their due process rights taken by a deficient 2009 Amendment process is not only implausible, per the PUD, ECLURs, and relevant law, that allegation is untimely.

What was promised was that the density and allowable PUD uses were not changed. Plaintiffs fail to show that no changes to Lodge parcel uses would be made as that was precisely the acknowledged reason for the 2009 Amendment. The PUD did not forbid this result. The 2009 process did not forbid this result. When the CPOA reviewed the thirty-four re-stated uses, it only challenged No. 14. They rewrote that language and approved all others. It is that approved language and re-written language provided by the CPOA that changed what might have been uses ancillary to the Lodge's historical operations to the option of an outpatient clinic as a stand-alone alternative. Had the CPOA intended to restrict uses to only cosmetic surgery or to only ancillary uses they could have easily so provided. The CPOA knowingly approved language which permitted the Proposed Use and accepted that this Proposed Use was consistent with existing uses allowable under the PUD. This is how the proposed amendment was noticed to the parties and the public.

The record supports that the 2009 PUD Amendment was adopted and approved through a public process with assistance from the CPOA which after a predetermined time precludes re-consideration and puts all property owners on notice that ANY of the thirty-four uses could be exercised on the Property at issue as a use by right. *South Creek Assoc.*, *id.*, 781 P.2d at 1033-34. The Court disagrees that the Board erred.

### B. The Board's Determination that Operative PUD Amendment Provisions Unambiguous, Therefore Making Resort to 2009 Legislative History Inappropriate, Is Not Arbitrary

#### 1. Cordillera Plaintiffs' Arguments

The Cordillera Plaintiffs argue that Board erred by not considering the Legislative History of the 2009 Amendment, since the operative words are ambiguous. They claim that the

record contains undisputed evidence that makes the interpreted language ambiguous since history from that proceeding makes clear that the 2009 Amendment was not intended to "introduce new uses or otherwise substantively change the existing PUD." The Court is not persuaded.

Plaintiffs appear to misperceive the purview of this Rule 106 review. C.R.C.P. 106(a)(4) is "limited to a determination of whether the body or officer has . . . abused its discretion, based on the evidence in the record before" the body. *Sierra Club v. Billingsley*, 166 P.3d 309, 311–12 (Colo. App. 2007) (citations omitted). The issue is not whether the evidence would support another conclusion or whether the conclusion is one which would be adopted by the reviewing Court, but instead whether the decision made is supported by competent evidence. The Board did not find the language to be ambiguous, there is competent evidence to support that finding and the Court will not substitute its conclusion for that of the Board. The Board's findings are stated herein when discussing the similar argument made by the Benson Plaintiffs. Further, this Court made findings above regarding the plain language of the PUD and found the language to be consistent with the Board's determination.

The Plaintiffs next argue that since that CCG/BHC and the planning staff together agreed to numerous conditions and safeguards on uses-by-right changes made when the 2009 PUD was adopted, those conditions must be met during the 2016 hearing. Again, the Court disagrees.

The Court does not interpret the previous PUD Amendment process that permitted the Commissioners to impose conditions and safeguards as meant to serve as grounds for the future denial of lawful use. Instead the imposition of conditions is intended to give the Board authority to tailor a proposed use to the conditions of the district so as to protect the health, safety and welfare consistent with the approved uses. *Western Paving Const. Co. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 506 P.2d 1230, 1231–32 (Colo. 1973). Once the 2009 PUD was adopted, the uses approved pursuant to those conditions have already been vouched for as part of the Amendment process. In other words, the uses as a matter of right were deemed to be consistent with these conditions.

The Cordillera Plaintiffs also cite the written explanation of the 2009 Amendments provided by the Amendment applicant BHC in 2009; the official notice that the Board published in the paper and sent to each Cordillera resident explaining the purpose and effect of the 2009 amendment. The Cordillera Plaintiffs contend that the Board's conclusion that the Amendment

had "substantially changed" the existing PUD to allow the Lodge's elimination and replacement is therefore an abuse of discretion because it cannot be squared with the 2009 stated purpose for the Amendment. The Court disagrees.

A re-hash the 2009 conditions in connection with the 2016 interpretation, is not legally inappropriate when the Board has not found the provision to be unambiguous. The ambiguity issue is discussed herein. Indeed, the proper procedure when a matter permitted by right is alleged to be incompatible with past usage or future community hegemony, is to initiate the PUD Amendment process. *See Western Paving Const. Co., id.*, at 1232. Given that the CPOA provided and the CMD agreed with this language in 2009, the Cordillera Plaintiffs' arguments to the contrary here are somewhat disingenuous.

The Court will further note that the language in the 2009 did not prohibit new or changed uses to the Lodge Parcel. It prohibited new or additional uses in the Cordillera PUD as whole. R. 0343. This is a critical distinction. Whether the Plaintiffs or the Cordillera property owners failed to understand that distinction in 2009, the language is clear. At the time of the 2009 Amendment, it was agreed that the additional uses now allowed under at the Lodge Parcel were consistent with existing uses allowed under the then existing PUD.

**2. Benson Plaintiffs' Arguments**

The Benson Plaintiffs also argues the Board abused its discretion by failing to consider the 2009 "legislative intent" of the "operative provisions" in the Amended Use No. 14 when it made its 2016 Interpretation since the Board admitted the PUD was ambiguous. They claim this history accords with their memory that the 2009 Amendment was meant only to facilitate operation of a medi-spa offering popular non-critical cosmetic surgery such as Botox injections or stomach stapling. *See* Cordillera Plaintiffs' Brief at pg. 13. The Court cannot agree.

Ambiguity arises not from the fact that the parties disagree about the meaning, but rather from whether a word, term or phrase is legally susceptible to two meanings. It is argued that during the 2016 hearing the Board remarked that the language could be read in more than one way. A close reading of the transcript however, reveals that the Board did not find that any of the language in Sections 2.01.1 or 3.01.2 of the PUD was capable of two meanings. Instead, Commissioner Ryan's complete remark was:

"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. What 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 proposed use is one of them." *Id.* at line 8.

Additionally, even assuming for the sake of argument that the language is ambiguous, the Board did, in fact, consider over four hours of testimony. In so doing, the Board examined the language Cordillera requested and approved during its review of the 2009 PUD Amendment and found that the intent urged by the Plaintiffs was not expressed by that language. The Court finds no misapplication of the law and there is ample support in the record that the Approved Use is consistent with the use-by-right.

The Court incorporates these ambiguity findings to the similar arguments made by the Cordillera Plaintiffs.

**Procedural Issues**

The Benson Plaintiffs reference specific 2009 "legislative history" that any legitimate interpretation in 2016 is limited by the 2009 Purpose Statement and Resolution. The Court finds these arguments to lack merit.

First, and most importantly, this legislative history is not part of the record and should not be part of the record absent a finding of ambiguity. Second, the Court finds this argument unpersuasive when the actual language that is part of the record and the 2009 PUD directly contradicts any such limitation. Third, the language at issue was drafted and provided to BHC and CCG by the CPOA after consultation with its own staff and attorneys.

Even when zoning provisions are susceptible of more than one reasonable interpretation, the Court will defer to the Board's interpretation when it is reasonable. *Sheep Mountain Alliance v. Bd. of Cnty. Comm'rs, Montrose Cnty*, 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). The fact that the parties do not agree about the provisions meaning does not mean the language is ambiguous. The Board made a reasonable interpretation of the PUD language. There is sufficient evidence to support the 2016 interpretation and therefore the action is not an abuse of discretion.

**Black Line Markup**

The first of the Benson Plaintiffs' arguments regarding erroneous excluded evidence relates to a "black-line" markup of the PUD purportedly attached to the CCG/BHC application for the PUD amendment in 2009. The black-line markup referenced in the Benson Plaintiffs' Brief is not a part of the Record, nor was this argument raised at the hearing below. The second argument regarding an email suffers from the same impediment. Since it is the Plaintiffs' responsibility to properly compile a complete record with regard to asserted error, their failure to do so here preclude further consideration. *Hock v. New York Life Insurance Co.*, 876 P.2d 1242, 1252 (Colo. 1994) (moving party can't take advantage of his own failure to designate pertinent portions of the transcript as part of the record). Therefore, the Court declines to consider these arguments further. The evidence is not part of the record and inappropriate to consider herein. The Proposed Use was disclosed well before hearing and Plaintiffs had ample time to submit evidence to contest this use. In this area, they failed to do so.

**2009 Notice Describing the Purpose and Effect of the 2009 PUD Amendment**

The Benson Plaintiffs contend that the Board's decision should be overturned based on alleged procedural defects in the 2009 Notice of Amendment. Importantly, the notice was made in 2009, and not an issue in the Cordillera appeal before the Board. Additionally, the evidence relied upon for this proposition is not part of the record and therefore, not properly addressed here pursuant to Rule 106.

The Benson Plaintiffs have presented no evidence that these issues were not or could not have been raised during the hearing on the Board appeal filed by the Cordillera Plaintiffs for full explication and consideration by the County Board. The Board is precisely the body that could have considered these arguments and given a chance to remedy them prior to this appeal. How the Board would have responded to such evidence cannot be known; however, that was time to present such evidence and at least build a record. As stated above, regardless of evidence presented by BHC at hearing, the Plaintiffs had notice of the Proposed Use and the issues which were before the Board.

**Claimed Defective Notice and Lack of Due Process Is Unpersuasive**

In the Benson Plaintiffs' Opening Brief they led this Court to believe the Plaintiffs had no opportunity to present evidence on the intent of the 2009 PUD Amendment or to raise issues of procedural irregularity in the 2009 Amendment Notice or Regulation to the Board. However, a

careful review of the record reveals this is simply not the case. CCG submitted its response to the CPOA Appeal of the Director's decision to the Board, with a courtesy copy to the Cordillera Plaintiffs, on September 12, 2016. R.0785. The Benson Plaintiffs have not shown that they tendered an opposing response or lacked the ability to fully understand the issues that could be raised.

The Benson Plaintiffs' argument of defective notice and lack of due process because in 2009 BHC stated there would be no changes in density or uses is simply not credible or supported by the record. It is obvious that several uses were added to the Lodge Parcel including the use: "Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care..." By accepting and approving this language, the CPOA was agreeing that this was an existing permitted use under the PUD. The Court cannot conclude that the Board's Interpretation is manifest error when it is grounded on a broad and contextual construction of the plain and ordinary meaning of the words used.

The Benson Plaintiffs allegations that they were somehow precluded from participating in the Board appeal held September 20, 2016 is not credible. R. 0097. Had the Benson Plaintiffs wished to provide additional evidence or raise the 2009 notice issue in response to CCG's September 12, 2016 position statement, they could, and should have done so during the presentation of argument or during the period set aside for rebuttal arguments at that hearing.

Instead they present evidence of post hearing items that were not considered by the Board after the hearing concluded. Importantly, the Benson Plaintiffs have not shown how these arguments and evidence regarding the intent and/or purpose of the 2016 interpretation of the 2009 Amendment are not the same issues brought up and discussed 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. The Benson Plaintiffs have also not shown that they could not be expected to understand the arguments that would arise at hearing given that the Proposed Use was known well in advance of hearing.

This failure is fatal to their claim. 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 and cannot benefit from their failure. *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).

In essence, the Benson Plaintiffs argue that the Board got it wrong. They ask this Court to substitute its judgment for that of the Board, something clearly precluded by Colorado precedent. *Bd. of Cnty Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996), 920 P.2d at 50; *Marker v. City of Colorado Springs*, 336 P.2d 305, 307 (Colo. 1959). A district court may not consider whether a lower tribunal's findings are right or wrong, substitute its judgment for that of the tribunal, nor interfere in any manner with the tribunal's findings in a Rule 106 action when there is any competent evidence to support the findings. *O'Dell, id.* The Plaintiffs ask the Court to consider matters outside of the record, when adequate notice of the issues before the Board were well known prior to hearing. The Court cannot do so on a Rule 106 appeal.

If the Benson Plaintiffs, the CPOA and the CMD failed to adequately consider the breath of the 2009 language on the Lodge Parcel, that does not convert the Board's interpretation in 2016, into an arbitrary, capricious or ultra vires mistake; and it is certainly not a valid legal basis for reversal. *South Creek Assoc. v. Bixby*, 753 P.2d 785, 787 (Colo. App. 1987) (it was incumbent upon [Plaintiff] to peruse the [changed] provisions of the PUD). The Court's legal responsibility is to determine whether there is support in the record for the Board's decision. *See O'Dell, id.*, 920 P.2d 48, 50 (Colo. 1996).

There is ample competent evidence supporting the Board's Interpretation here, and again, the Court perceives no error.

### C. The Board's Determination is not Limited by the 2009 PUD's Reference to "Resort Residential Community"

Plaintiffs contend that the Board's determination, which allows the Lodge owner eliminate access to Lodge amenities by Cordillera residents, is an interpretation that exceeds the Board's jurisdiction. To get there, the Cordillera Plaintiffs argue the clear uses-by-right on private property contained in §2.01.1 of the 2009 PUD, are, by law, subordinated to the more generalized, "resort residential community" language contained in another part of the PUD, and that this mandates that the Lodge amenities remain accessible and open to the Cordillera community. The Court cannot agree.

The "resort residential community" purpose language referenced by the Cordillera and Benson Plaintiffs applies to all of the 7000-acre community of Cordillera. If resort residential community somehow mandated general community access, that result would apply equally to all residential properties. It makes no sense to rule that the residential uses expressly authorized for

the Lodge somehow must be less private than any other privately owned dwellings in Cordillera. The Court will not make such a nonsensical interpretation. *See Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998).

Not only does "resort residential community" not provide evidence of entitlement to access, the record also contains evidence that militates strongly against the Plaintiffs' claim of reasonable reliance on it. For example, the Cordillera Declaration at 2.3 "Private Amenities" provides that access to and use of the Private Amenities are strictly subject to the rules and procedures of the respective Owner of the Private amenities. The Declaration provides that "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." The Declaration also provides in pertinent part:

> All Persons, including all Owners, are hereby advised that no representation or warranties, either written or oral have been or are made by the Declarant or any other person with regard to the nature or size of improvements to or the continuing ownership or operation of the Private Amenities. No purported representation, warranty, written or oral is regard to the Private Amenities shall ever be effective without an amendment hereto executed or joined into by the Declarant. ... Rights to use the Private Amenities will be granted only to such persons, an on such terms and conditions, as may be determined by their respective owners. Such 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 their use rights all together. R. 0807, Decl. 2.3

While the Board cannot in this proceeding enforce the covenants in the Declaration, the existence of these provisions strongly suggest the limited legal force of Plaintiffs' claimed reliance on their entitlement to continued access. Even if there were such reliance on the treatment of amenities due to previous statements, the Court cannot say that such reliance is reasonable. Intervenor was permitted by Declaration to terminate use rights all together.

In contrast, the interpretation given to the PUD by the Board not only accords with the legal standing of the private owners, but is also reasonable when all evidence in the record is reviewed by the Court in a light most favorable to the Board's findings. It's clear that the balance that the Board reached in balancing private property right and the Cordillera Plaintiffs is also supported by the record and therefore it will be upheld. *Lieb v. Trimble*, 183 P.3d 702, 704 (Colo. App. 2008). To conclude otherwise requires the Court to construe the language in an absurd manner.

For example, many of the PUD listed thirty-four standalone uses-by-right for the Lodge Parcel and preclude general community access. The Lodge lists several private uses as offices, commercial space, residential uses, employee housing, educational facilities, day care facilities, and clinics that would result in community exclusion. R.0357-358; R.0363-364. As a matter of statutory construction, these specific, explicitly authorized uses must also be eliminated or otherwise qualified if as Cordillera argues the general purpose and intent statement limits uses by right.

Even agreeing, for the sake of argument that some "resort residential" component was required, the Approved Use satisfies that requirement. The Approved Clinic and Residential facilities were represented as high end lodging that will provide a relaxing resort environment for people recovering from addiction, in a manner similar to the Lodge has previously provided a retreat and relaxing environment to the current residents of Cordillera. R.0769. The instant Property will continue to be operated with resort residential use with a price tag of $60,000 per month: it's only the proposed "members" who will change. 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); *see also SecurCare*, 10 P.3d at 1251.

It's well settled that when construing two different provisions of land use legislation the general rule is that if there is a conflict, the more specific words governs the general. *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 384–85 (1992). A specific portion of the PUD should not be deemed to be nullified by a general statement in the PUD absent evidence of a definite contrary intention. *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir. 1993). No such evidence appears here.

The Board determined the clear and specific uses-by-right control over the generalized purpose statements in the PUD, and that a non-discriminating use of the property by those with handicaps should be similar to the treatment of able bodied former patrons. R .0857 ("This general language does not trump the clear uses-by-right for the Lodge Parcel"). The Court finds this PUD interpretation reasonable, and not a misinterpretation or misapplication of applicable law. *See Platte River Cons. Org. v. Nat'l Hog Farms*, 804 P.2d 290, 292 (Colo. App. 1990).

An established rule of legislative construction is that the Court must strive to interpret legislative language in a manner that avoids absurd or illogical results, and to interpret language in a manner that avoids rendering any provision superfluous." *Qwest Corp. v. Colo. Div. of Prop. Taxation,* 2013 CO 39, ¶ 16, 304 P.3d 217.

### D. The Board's Interpretation Isn't Arbitrary and Capricious as The Record Contains Competent Evidence that Residents' Alleged Reliance on Permanent Open Access Is Not Reasonable

#### 1. Cordillera Plaintiffs' Arguments

The Cordillera Plaintiffs claim that since the record contains competent evidence that the residents relied on continued access to the Lodge, the Board's Interpretation must be arbitrary and capricious. The Court cannot agree.

The argument is factually incorrect, and bottomed on the erroneous conception that the Court sits as a "super board" for purposes of this appeal and is to correct "wrong" decision. That simply is not legally defensible. *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714 (Colo. App. 2008). As stated above, a Rule 106 hearing is to determine if the Board's decision is supported by the record, not an opportunity for it to sit as a zoning board of appeals. The Court cannot and will not substitute its judgment for the judgment of the Board.

Here, the record reveals that the Board did consider the intent after thorough examination 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 (Commissioner Ryan: "[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").

Likewise, the "resort residential community" purpose language referenced by the Cordillera and Benson Plaintiffs applies to all of the 7000-acre community of Cordillera. If resort residential community somehow mandated general community access, that result would apply equally to all residential properties. It makes no sense to rule that the residential uses expressly authorized for the Lodge somehow must be any less private than any other privately owned dwellings in Cordillera. Again, the Court will not make such a nonsensical interpretation. *See Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998).

Even assuming for the sake of argument that there is language that suggests that the Lodge was intended to be a public amenity open to the Cordillera community, again that argument is strongly negated by the fact that the Declaration of Protective Covenants, Conditions and Restrictions for Cordillera, which existed prior to the 2009 PUD Amendment and are still in force, were provided to every homeowners prior to their purchase of property. The Declarations clearly stated that this was not the case of this privately owned property. Access could be terminated at any time. Thus, the Court finds that as a legal matter the Board's implicit decision that any purported reliance on such continued access is unreasonable is supported by the record. *See* R.0806-0807.

The Board's interpretation of the language in the PUD was not unreasonable or inconsistent with generally applied rules of legislative construction. Therefore, the Court will not reverse it on this ground. *See, Rivera–Bottzeck, id.*, 134 P.3d at 521.

**2. The Benson Plaintiffs' Arguments**

The Benson Plaintiffs didn't present any legal arguments in regard to the requirement that Lodge use be open to Cordillera residents and property owners. Instead, they argued that the Board failed to incorporate the specific conditions required by the Board in 2009 for passage of the 2009 PUD, including in particular, that no owner in particular benefit instead of the community as a whole. For the reasons already discussed above, the Court also finds these purported errors do not support reversal as none sufficiently raises action beyond the Board's jurisdiction or so manifestly unfair as to be arbitrary and capricious.

Additionally, the Court rejects the Benson Plaintiffs' contention that the Board's Interpretation is flawed because the Board did not consider, and made its determination in contravention of, the conditions of approval made prior to adoption of the 2009 PUD Amendment. The condition that they specifically cite is that the "PUD Amendment is not granted solely to confer a special benefit upon any person." ECG 344. The Court disagrees as this condition was properly vetted during the 2009 Amendment process after notice and an opportunity to be heard and the uses as a matter of right were deemed acceptable and consistent with this provision. Further, the Plaintiffs have failed to adequately show that these concerns were not considered. Finally, the Board's interpretation does not confer a special benefit upon any person. The Board's interpretation requires BHC/CCG to be limited by Approved Uses

under the PUD. This limitation applies to every owner under the PUD and is not a special benefit. It is also consistent with rights already provided in the Declarations.

The Benson Plaintiffs agree that CCG/BHC and the planning staff together agreed to numerous conditions and safeguards on the list of uses-by-right when the 2009 PUD was adopted. The conditions were intended to give the Board authority to tailor a proposed use to the conditions of the community in 2009 so as to protect its' health, safety and welfare. *Western Paving Const. Co. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 506 P.2d 1230, 1231–32 (Colo. 1973). In making the 2009 PUD amendment, the Community Development Director, the County Commissioners and the CPOA found that none of the listed uses violated the "conditions" at issue.

Therefore, by the time the Board approved the 2009 PUD amendment, those conditions had been vetted through that public hearing process and incorporated into the amended uses. Since the 2009 PUD was adopted eight years ago, it's improper to re-hash the conditions imposed in 2009 in this proceeding. This provision was a condition of approval of the PUD amendment in 2009. It was not a condition of use. To the extent it has any relevance to this appeal, it was agreed in 2009 with input from CPOA that the approved uses met this condition.

However, even if arguably such evidence should be considered, the Benson Plaintiffs fail to provide any evidence that the concerns producing these conditions were not considered. A review of the record shows that during the 4.5 hours of deliberation the Board heard these same arguments made against the staff interpretation based on grounds that are similar, if not identical, to the rationale for the 2009 conditions they now urge. The only evidence Plaintiffs' urge was not considered by the Board was tendered to it after the hearing.

## IV. CONCLUSIONS

Review of the Board of County Commissioners Interpretation pursuant to 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 body. *Sierra Club v. Billingsley*, 166 P.3d 309, 311–12 (Colo. App. 2007) (citations omitted). After public hearing the Board adopted and ratified 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, when the clinic portion is limited to outpatient, rather than an inpatient use. R.0855-859. Substantial and credible evidence in the Record supports the Board's finding. The 2009

Amendment was approved in 2009 in a hearing that accorded all Plaintiffs appropriate due process and a sufficient opportunity to be heard. There is no legal reason that the 2009 process needed to be repeated in connection with a request for an interpretation of the language used at that time. The specific language at issue here was not determined by the Board to be susceptible to two or more meanings, and the fact that the parties disagree about its meaning is not dispositive.

The Board's interpretation and findings in this matter are supported by the record and must, therefore, be given deference by this Court. *See City and County of Denver v. Industrial Commission*, 690 P.2d 199, 203 (Colo.1984). Great deference is also afforded the County staff's interpretation of the regulations it has had an integral role in regulating. *Id.*; *Humana, Inc. v. Board of Adjustment,* 537 P.2d 741, 743 (Colo. 1975). 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).

None of the Plaintiffs here has successfully sustained this burden. Instead, each set of Plaintiffs complain that the Board essentially made the wrong decision and ask this Court to change it. However, this Court cannot consider whether a Board's findings and conclusions are right or wrong, substitute its judgment for that of the tribunal, or otherwise interfere with the Board's findings when, as here there is competent evidence to support the Board's Interpretation. *Bd. of Cnty Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996).[5]

As described above this is such a case: there is ample, competent evidence in the record supporting the Board's final Interpretation. The Court finds that the use proposed by CCG, as modified by the Board, i.e. the "Approved Use", meets the plain meaning of a standalone, outpatient, non-critical care clinic, and a separate non-medical, residential facility. It was based upon language provided to, agreed to and modified by the CPOA.

The Board appropriately applied the plain meaning of the 2009 Amendment. It was supported by competent evidence. While the Plaintiffs disagree with the interpretation, that does not make it an abuse of discretion, nor does it mean this Court should substitute its judgment.

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[5] Of critical importance here is the limited role of the judiciary in zoning cases. As the Court noted in *Board of Cnty Comm'rs v. O'Dell*, 920 P.2d 48 (Colo. 1996), "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* at 50.

The Board did not, as argued by the Cordillera Plaintiffs, amend the PUD under the guise of interpreting it. It made findings based upon the plain language of the PUD.

Further, as this Court finds that there is ample evidence in the record to support the determination of the Board and for the other reasons stated herein, the Court declines to remand for further presentation of evidence related to the intent of the 2009 Amendment as requested by the Benson Plaintiffs.

## V. ORDER

Accordingly, for the reasons above, the Court finds that the Board's decision to ratify the Director's decision, as modified, is reasonable, well within the Board's jurisdiction, supported by competent evidence in the record, not an abuse of discretion and not a misconstruction or misapplication of the applicable law.

Therefore, the Court **AFFIRMS** the Eagle County Board of County Commissioners' adoption of the Resolution 2016-079.

**IT IS SO ORDERED** this 15th day of September, 2017.

BY THE COURT:

Paul R. Dunkelman
District Court Judge