

DISTRICT COURT, PARK COUNTY, COLORADO Eleventh Judicial District P.O. Box 190, 300 Fourth Street Fairplay, CO 80440 Telephone: (719) 836-2940	DATE FILED January 23, 2025 9:25 AM CASE NUMBER: 2024CV30019
Plaintiff: Will-O-Wisp Metropolitan District, a quasi-municipal corporation and political subdivision of the State of Colorado, v. Defendants: Board of County Commissioners for Park County, Colorado; and aSkag LLC.	^ Court use only ^ Case Number: 2024CV30019
FINDINGS AND ORDER ON C.R.C.P. 106(a)(4) REVIEW	

I. Introduction.

This case is before the court for determination of plaintiff's Complaint for Judicial Review Pursuant to C.R.C.P. 106(a)(4). Plaintiff asks the court to find that defendant Board of County Commissioners for Park County (BOCC) abused its discretion in approving a Planned Unit Development application (Application) of defendant aSkag LLC (aSkag) to operate a waste transfer station on a parcel of property adjacent to plaintiff's. Complaint, First Claim, C.R.C.P. 106(a)(4). It seeks relief in the form of a permanent injunction. Second Claim, Permanent Injunctive Relief.¹

II. Facts.

¹ The complaint also sought a preliminary injunction but that relief has not been pursued in this action.

Both parties submitted a statement of facts with their briefs. While both are accurate, plaintiff's statement is more thorough, and the court adopts it as its findings.

III. Standard of Review.

In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law: (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

C.R.C.P. 106(a)(4).

"C.R.C.P. 106(a)(4) ... contemplates that the district court will review the record of the proceedings to make this determination." *Canyon Area Residents for the Environment v. Board of Cnty. Com'rs of Jefferson Cnty.*, 172 P.3d 905, 907 (Colo.App.2006).

[I]n a C.R.C.P. 106(a)(4) action, "judicial review of a governmental agency exercising its quasi-judicial role ... is limited to whether the body has exceeded its jurisdiction or abused its discretion." ... (Courts) review de novo whether the agency abused its discretion. ...

An agency abuses its discretion if its decision is not reasonably supported by any competent evidence in the record, or if the agency has misconstrued or misapplied applicable law. ... An action by an agency is not arbitrary or an abuse of discretion when the reasonableness of the agency's action is open to a fair difference of opinion, or when there is room for more than one opinion. ...

"In reviewing the agency's construction, (courts) rely on the basic rules of statutory construction, affording the language of the provisions at issue their ordinary and common sense meaning." ... "(The court's) primary task in interpreting statutes and (local government) enactments is to give effect to the intent of the drafters, which we do by looking to the plain language." ... If the language of the provision at issue is clear and the intent of the legislative body that enacted it may be discerned with certainty, we may not

resort to other rules of statutory interpretation. ... When construing an ordinance in the C.R.C.P. 106(a)(4) context, “we give effect to every word and, if possible, harmonize potentially conflicting provisions.” ...

Our review of the agency’s factual, discretionary determinations is more deferential. We must uphold the Commission’s decision unless there is no competent evidence in the record to support it. ... “No competent evidence” means that the Commission’s decision is “so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” ... “An action by an administrative [body] is not arbitrary or an abuse of discretion when the reasonableness of the [body’s] action is open to a fair difference of opinion, or when there is room for more than one opinion.” ... Because we are not the fact finder, we “cannot weigh the evidence or substitute our own judgment for that of the [administrative body].” ...

Johnson v. Civil Service Commission of City and County. of Denver, 417 P.3d 963, 967–68, 2018 COA 43, ¶¶ 13-16 (Colo.App.2018) (citations omitted).

A “presumption of validity and regularity which supports the official acts of public officials and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” *Colo. Springs v. Dist. Court of El Paso County*, 519 P.2d 325, 327 (Colo.1974).

IV. Discussion and Legal Conclusions.

Whether an industrial use, aSkag’s waste transfer station, may be sited in a PUD has two aspects. First, whether a single use development qualifies as a PUD. Second, if it does, whether the application qualifies under the applicable law. Both situations require the court to consider whether BOCC abused its discretion by misapplying applicable law. *Whitelaw v. Denver City Council*, 405 P.3d 433, 437, 2017 COA 47, ¶ 7 (Colo.App.2017) (“An agency’s misinterpretation or misapplication of governing law may constitute an alternative ground for finding an abuse of discretion under C.R.C.P. 106(a)(4).”).

As to the first question, whether a single use development qualifies as a PUD, the answer is “no”. It does not do so either under state statute or the county regulations.

The county’s approval of aSkag’s application for a PUD is contrary to the Legislative Declaration in § 24-67-102, C.R.S., which expresses the purpose and intent of planned unit

development statutory law. That section of the act discusses desired objectives obtained by siting mixed uses in a single area. The declaration is consistent with the general understanding of what PUDs are, a development which allows a combination of residential, commercial and industrial uses to be built in one development. See generally, Rathkopf's The Law of Zoning and Planning, § 88.1 ("The best short definition is that a planned unit development is a zoning technique that encompasses a variety of residential uses, and ancillary commercial, and perhaps, industrial uses.").

More importantly, the county's approval of aSkag's application for a PUD is clearly contrary to the specific statutory definition of "Planned unit development" in § 24-67-103(3), C.R.S.:

"Planned unit development" means an area of land, controlled by one or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational, or industrial uses, or any combination of the foregoing, the plan for which does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations.

§ 24-67-103(3), C.R.S.

Breaking the definition down into its elements clarifies its meaning. A PUD is:

1. an area of land,
2. controlled by one or more landowners,
3. to be developed under unified control or unified plan of development
4. for a number of dwelling units, commercial, educational, recreational, or industrial uses,
5. or any combination of the foregoing,
6. the plan for which does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations.

The statutory definition has two components. First, "unified control or unified plan" of diverse uses ("dwelling units, ...(or) commercial, ... or industrial uses"). Merriam-Webster's online dictionary defines "unified" as "brought together as one". It includes synonyms for "unified": "merged", "combined", "coordinated", "blended", "joined", "harmonized". This means at least two different elements are being combined into a single entity. A development which has one element – here, a single industrial use, operation of a waste transfer station – is not, by definition, a unified development.

The second component is that “the plan ... does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations.” *Id.* In other words, a proposed development is a PUD within the meaning of the Planned Unit Development Act of 1972, § 24-67-101 et seq, C.R.S., only if (the proposed change is a “unified plan” and) the existing land use regulations do not provide for the proposed use. Here, they do; a waste transfer station is a permitted use in an industrial zone under the county’s LURs. See LUR, § 4-200; CR 1511-1512; Certified Record (CR) pp. 1564, 3824-25. One may be sited upon property that is zoned industrial.

In addition, the county’s approval of aSkag’s application for a PUD is also contrary to its own land use resolution.

The county code includes a definition of PUD and it mirrors that of the state act. See LUR, § 5-313(A), CR 1571. (The only difference is that the county definition breaks “industrial” into “light industrial uses, heavy industrial uses”.)

However, the county went on to further refine the type of development to which a zoning change to PUD applies. In LUR § 5-313 Special Notes it states at part (B)(1): “The PUD Zone District is used to uniformly plan *residential* use of property *with a mix* of related or supporting recreational, commercial, light industrial, and/or heavy industrial uses.” CR 1571 (emphasis added). Simply put: a PUD is a zone that applies to developments which include both residential and non-residential uses. LUR § 5-313 adopts the generally understood purpose of PUDs – that they are a deviation from the traditional “Euclidean”² zoning schemes which limit use within each district to singular type of use. E.g., in an industrial district residential uses are prohibited; in a residential district only dwellings are permitted, commercial uses are prohibited. More importantly, it also is a statement that PUD zoning is to be available only when at least some portion of the proposed PUD plan includes residential development. The plan at issue has no residential component. It has no mixed use. It does not meet the county’s land use regulations.

² Anderson’s American Law of Zoning § 24:7 (5th ed.) (“rigid separation of uses ... is characteristic of *Euclidian* zoning”).

The county abused its discretion here in ignoring LUR § 5-313(B)(1) on the aSkag application because (1) there is no residential component to the application and (2) it is for a single type of use – heavy industrial (operation of a waste transfer station) – not a residential development with a “mix of related or supporting recreational, commercial, light industrial, and/or heavy industrial uses”, and (3) it ignores the fact that the LURs specifically provide a zone (i.e., industrial) in which the proposed use is permitted. *Whitelaw v. Denver City Council*, 405 P.3d 433, 437, 2017 COA 47, ¶ 7 (Colo.App.2017) (“An agency's misinterpretation or misapplication of governing law may constitute an alternative ground for finding an abuse of discretion under C.R.C.P. 106(a)(4).”).

This finding alone resolves the issue before the court, whether the county's approval of aSkag's application for PUD rezoning was lawful. But the court will address one further corollary point which is also problematic, spot zoning. Under the guise of the PUD statute and regulations the county unlawfully spot zoned an industrial use in a residential zone.

Spot zoning asks “whether the change in question was made with the purpose of furthering a comprehensive zoning plan or [was] designed merely to relieve a particular property from the restrictions of the zoning regulations.” *Clark v. City of Boulder*, 146 Colo. 526, 531, 362 P.2d 160, 162 (1961).

[S]pot zoning “creates a small island of property with restrictions on its use different from those imposed on the surrounding property.”... If the rezoning is for the purpose of furthering a comprehensive zoning plan or based on changed conditions, the rezoning is not spot zoning. ... Likewise, reclassifications when the “new use is consistent with others in the surrounding area”.

Whitelaw v. Denver City Council, 405 P.3d 433, 445, 2017 COA 47, ¶ 63 (Colo.App.2017).

These cases give the court five factors to consider in determining whether spot zoning occurred. (1) “(W)hether the change in question was made with the purpose of furthering a comprehensive zoning plan. *Clark* and *Whitelaw*. (2) Was it “designed merely to relieve a particular property from the restrictions of the zoning regulations?” *Clark*. (3) Did it “create() a small island of property with restrictions on its use different from those imposed on the

surrounding property”? *Whitelaw*. (4) Was the rezoning “based on changed conditions”? *Id.* And, (5) Was the “new use ... consistent with others in the surrounding area”? *Id.*

The court will consider the five factors in order.

(1) Changing this property to PUD to allow a single use permitted without further waiver only in an industrial zone did not “further a comprehensive zoning plan.” *Id.* Plaintiff has shown that the changed zoning to a single use PUD does not meet the requirements of a PUD application, is not consistent with the Strategic Master Plan, and ignores the route available under the comprehensive zoning plan to aSkag to have obtained approval for its development (conditional use).

The county has a comprehensive zoning plan which provides for separate residential and industrial zones. It also provides that industrial uses may be developed in conjunction with residential uses, if done as part of a PUD and, as discussed above, the county did not follow the PUD requirements. The subject property was zoned residential until BOCC’s approval of aSkag’s application. Certified Record (CR) 3816, ll: 15-16. The county’s Strategic Master Plan (SMP) (a study with suggestions for development of the county) recommends the area including this parcel be residential and commercial, not industrial. While the SMP does not appear to be binding on zoning district changes in Park County³, whether it was followed tends to show the change to PUD zone was not done “for the purpose of furthering a comprehensive zoning plan”. The county does not point to anything in the record to show that the change of this property from residential to industrial furthered a comprehensive zoning plan.

³ The master plan of a county or region shall be an advisory document to guide land development decisions; however, the plan or any part thereof may be made binding by inclusion in the county's or region's adopted subdivision, zoning, platting, planned unit development, or other similar land development regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes as appropriate.

Friends of the Black Forest Preservation Plan, Inc. v. Board of Cnty. Commissioners of El Paso Cnty., 381 P.3d 396, 402, 2016 COA 54, ¶ 25 (Colo.App.2016), interpreting § 30–28–106, C.R.S., Master Plan. Here, the master plan was not made binding on the Land Use Regulations.

Here, the SMP and LURs directly addresses the area in question. See LUR § 5-310(A): “A. Purpose. This zoning district is created for the purpose of regulating lands for industrial uses.” CR 1564. LUR § 5-310 also provides at part B: “Special Note: The Industrial Zone District is intended for application to areas designated as appropriate for commercial and industrial development by the Park County Strategic Master Plan.” Together, the LURs and SMP comprise a “comprehensive zoning plan.” *Whitelaw*, 445, ¶ 63.

The Strategic Master Plan (SMP) does not recommend that the land at issue (Pine Junction/Crow Hill) be considered for heavy industrial use; rather it recommends residential, “small scale neighborhood commercial” and “small scale mountain style light industrial” development. CR 1400. The court is mindful that “The Strategic Master Plan is not regulatory and does not change existing regulations, nor does it create new regulations. It is an advisory document ...”. SMP (Role of the Strategic Master Plan), CR 1338. At the same time it “charts a direction for strategic economic and infrastructure planning and provides guidance for changes to the Land Use Regulations as a component of this strategic planning.” *Id.* The county concedes that the transfer station is not light industrial. Answer Brief, p. 11.

(2) The record supports plaintiff’s argument that the approval of the PUD here was “designed merely to relieve a particular property from the restrictions of the zoning regulations.” While the county provides several justifications for its action, such as reducing heavy truck traffic on Highway 285 and promoting local business, it fails to show how those benefits were attainable only by granting the PUD application. In other words, the benefits the county touts were obtainable by following the requirements of the county LURs. A waste transfer station may have been approved under the LURs: (1) in an industrial zone; (2) under a conditional use permit or (3) as part of a diverse use PUD (i.e., one with residential and industrial components).

(3) The zoning change here created a small island of property with restrictions on its use different from those imposed on the surrounding property. The record shows the surrounding properties are zoned residential and commercial, not industrial.

(4) BOCC contends it considered “the changing landscape and needs of Park County.” Answer Brief, p. 16. But it cites no part of the record in support. In fact the record contradicts that argument – the planning staff report’s “bullet point that changed circumstances and

conditions were “Not Applicable”). (To its credit the BOCC also references this fact in its Answer Brief. Id.)

(5) The new use of the aSkag property is not consistent with others in the surrounding area. The new use is heavy industrial, essentially a use at the far end of the zoning spectrum from residential, which is what the property was zoned prior to the change and which is what the surrounding properties are zoned (along with commercial).

In sum, the record supports plaintiff’s spot zoning argument.

Because these findings – that the county abused its discretion by its misinterpretation or misapplication of governing law – require judgment on plaintiff’s C.R.C.P. 106(a)(4) claim, the court need not address plaintiff’s remaining arguments.

Therefore, it is ordered:

1. The Park County Board of County Commission’s approval of the Final Application in Resolution No. 2024-09 is reversed.
2. The court enters a permanent injunction prohibiting aSkag from operating the Waste Transfer Station on the site approved in Resolution No. 2024-09.

By the court, this 23rd day of January, 2025,

/s/ Amanda Hunter, District Judge.