

# EXHIBIT E

DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 LaPorte Ave., Suite 100 Fort Collins, CO 80521-2761 970-494-3500	DATE FILED: 08/10/2020 15:25:04 FILED IN: 15 CV 30044 CASE NUMBER: 2020CV30580
Plaintiff: PKR FARM, LLC  vs.  Defendants: BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, STATE OF COLORADO; THE BRAD AND LINDSEY MODESITT TRUST	σ COURT USE ONLY σ
	Case No. 15 CV 30044 Courtroom: 3B
<b>ORDER ON RULE 106 PETITION</b>	

This matter is before the Court for ruling on the petition for review under C.R.C.P. 106(a)(4) filed by Plaintiff PKR Farm, LLC. Plaintiff filed its opening brief on June 11, 2015. Defendants filed separate response briefs on July 21 and 23, 2015, and Plaintiff filed a reply brief on August 18, 2015. The Court has reviewed the briefs and the entire record below and finds and orders the following:

## I. Background

After a public hearing held on December 22, 2014, by a vote of 2-1, the Board of Commissioners of Larimer County (“Board”), approved a special review application submitted by the Modesitt Trust (“Trust”) for an expansion of the Trust’s current rafting business (Mountain Whitewater Descents) to include a bar and restaurant with an outdoor live music venue, community hall, and an outdoor play area. The Board issued its Findings and Resolution Approving the Petition of Brad

and Lindsey Modesitt Trust for Mountain Whitewater Descents on March 10, 2105. Plaintiff is challenging the Board's action under Rule 106(a)(4).

Plaintiff PKR Farms is a farm located at 2345 North Shields Street, Fort Collins, and is zoned FA-1. The Trust property is located at 2411 North Shields Street, which is adjacent to Plaintiff's land, and has been rezoned from FA-Farming to PD – Planned Development. Both properties are located in the Fort Collins Growth Management Area (GMA) District. The Trust property is also adjacent to Colorado Highway 287, which is scheduled for expansion by the Colorado Department of Transportation.

Prior to the instant Special Review application, the Trust had operated under Special Exceptions which allowed for a commercial rafting business and associated retail uses on the Trust property. The Trust had been operating the rafting business since 2001, and has been operating an associated “Paddler’s Pub” business with a limited liquor license for several years. The rezoning of the Trust property allowed for a restaurant and tavern without Board approval. The Special Review application was submitted on March 10, 2104, and sought Board approval for outdoor seating in connection with the restaurant or tavern use, and for the community hall use. Specifically, the Trust sought expansion of the existing rafting business to include a bar and restaurant with an outdoor live music venue that could accommodate up to 1,200 people, a community hall for wedding and other special events, and an outdoor play area.

At the December 22, 2014 public hearing, a number of neighbors spoke in reference to the application, with some in favor and some opposed. There was discussion regarding noise, the character of the area and the adjacent highway, and the impact that the proposed expansion would have on the area, both the potential positive impacts and negative impacts that the expansion may have on the area. After the public hearing, the Board approved the Trust's Special Review application with conditions that include limiting the number of events with attendance of up to 1,200 persons to two per month, limiting the hours of operation, requiring provision of public sewer, and providing installation of identified turn lanes. On March 10, 2015, the Board issued its Resolution approving the Trust's Special Review Application, and this action under Rule 106 followed.

## II. Standard of Review

Under C.R.C.P. 106(a)(4)(I), the district court reviews a quasi-judicial function to determine “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.” This standard is highly deferential to the quasi-judicial body. *Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004). The reviewing court shall not reweigh the evidence in the record, *Bd. of Cnty. Comm’rs v. O’Dell*, 920 P.2d 48, 50-51 (Colo. 1996), and a body’s ultimate decision need not be overturned merely because there is contrary evidence in the record. *Martinez v. Bd. of Comm’rs of Housing Auth.*, 992 P.2d 692, 696 (Colo. App. 1999). The Court’s role is not to find facts, to modify the decision maker’s decision, or to question the wisdom of the decision. *See Corper v. City & Cnty. of Denver*, 552 P.2d 13, 15 (Colo. 1976). Rather, the Court’s role is limited to ensuring that the quasi-judicial body acted within its legal authority and that the decision is supported by competent evidence.

C.R.C.P. 106(a)(4) requires the court to review the final decision of the quasi-judicial body. *Keystone v. Flynn*, 769 P.2d 484, 489 & 489 n.7 (Colo. 1989). It is not a mechanism for reviewing decisions at all levels of the administrative process. *See, e.g., Nixon v. City & Cnty. of Denver*, 2014 COA 172, ¶¶ 7-9; *Lovett v. School Dist. No. 1*, 523 P.2d 152, 153 (Colo. App. 1974).

There is no dispute that the Board was acting in a quasi-judicial capacity when it reviewed the Special Review Application. Therefore, the Court will analyze only whether the Board abused its discretion or exceeded its jurisdiction.

There is also no dispute that the Special Review application is subject to the review criteria set forth in Section 4.5 of the Larimer County Land Use Code. Section 4.5.3 provides:

To approve a special review application, the county commissioners must consider the following review criteria and find that each criterion has been met or determined to be inapplicable:

A. The proposed use will be compatible with existing and allowed uses in the surrounding area and be in harmony with the neighborhood;

- B. Outside a GMA district, the proposed use is consistent with the county master plan. Within a GMA district, the proposed use is consistent with the applicable supplementary regulations to the GMA district, or if not, with the county master plan or county adopted sub-area plan;
- C. The applicant has demonstrated that this project can and will comply with all applicable requirements of this code;
- D. The proposed use will not result in a substantial adverse impact on property in the vicinity of the subject property; and
- E. The recommendations of referral agencies have been considered.
- F. The applicant has demonstrated that this project can meet applicable additional criteria listed in section 4.3 use descriptions.

*Larimer County Land Use Code, Section 4.5.3, Res. No. 06172003R009, 6-17-2001; Res. No. 0502206R007, 5-2-2006; Res. No. 06032008R003, Exh. A, 6-3-2008.*

Specifically, Plaintiff asserts that the Board exceeded its jurisdiction or abused its discretion by (1) not properly applying the criterion set out in 4.5.3 (A), above, that is, that the use will be compatible with the existing and allowed uses in the surrounding area and be in harmony with the neighborhood; (2) that the Board did not properly apply the criteria in 4.5.3 (B), (C), (D) and (E); and (3) that Commissioner Gaiter had improper *ex parte* communication with representatives of the Trust. The Board and the Trust each reject those contentions, and argue that the Board had evidence before it that supports its approval of the project, and that there were no improper communications between Commissioner Gaiter and the applicants.

### **III. Determination by the Board**

There is no dispute that the Board was acting as a quasi-judicial body when it reviewed, and subsequently approved, the Trust's Special Review application. The question before the Court is whether the Board exceeded its jurisdiction or abused its discretion.

#### **A. Exceeding Jurisdiction**

A reviewing court can reverse a quasi-judicial decision if the decision maker exceeded its jurisdiction. C.R.C.P. 106(a)(4); *City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008). By the plain language of the Rule, this permits the Court to reverse the Board's decision if the Board lacked legal authority to act. *See City of Commerce City*, 185 P.3d at 178. Here, the City's Comprehensive Plan identifies

the land along the highway 287 corridor as “Rural Lands;” the County’s Master Plan, Section 3.1.1, provides that urban development can occur if it meets basic service levels and is compatible with the policy or land use plan for the adjacent city. For the County’s purposes, all of the lands within the GMA are considered “urban lands.” The county development review team determined that commercial development is likely along the highway corridor despite the City’s designation of “rural lands.”

Consequently, and based upon the initial comments of the City, dated April 4, 2014, Plaintiff asserts that the Board exceeded its jurisdiction by not rejecting the proposal pursuant to the GMA provision in 4.5.3(b) and acceding to the City’s comments. The Court disagrees. Plaintiff notes that the City of Fort Collins, in reviewing the application and its proposed use under the GMA, initially provided negative comments about the proposal, and recommended that the proposal be rejected. There is no dispute that the Trust Property is within the Fort Collins GMA. Under its guidelines, the Board is to determine whether “Within a GMA district, the proposed use is consistent with the applicable supplementary regulations to the GMA district, or if not, with the county master plan or county adopted sub-area plan.” Land Use Code Section 4.5.3(B). Here, the Board asserts that there have not been any supplementary regulations that apply to the Trust Property, and no county-adopted sub-area plan. The Board was to consider any recommendations by the City of Fort Collins as well as the consistency of the proposal with the County’s Master Plan. The provision does not require the Board to follow the City’s recommendations, regardless. Plaintiff does not cite to any law which requires the Board of County Commissioners to strictly follow (not just consider) the recommendations of the City. Accordingly, the Court does not find that the Board exceeded its authority by not following the City’s initial recommendation.

Further, the Court finds that the Board further considered the City’s recommendations, and adopted at least some of the recommendations that the City made in its subsequent review. Initially, the City’s recommendation was not supportive of the application, in part, stating that the Plan “appears inconsistent with certain principles and strategies of the County’s Master Plan for urban and rural development to maintain distinct and separate urban areas.” *See April 4, 2014 Summary of Comments, Comment 5.* However, the City subsequently reviewed the Plan and provided additional comments and noted that “the rural character of additional commercial development will be crucial...and that [rural] character should be continued in any changes and expansions, as much as possible.” The City’s recommendations included review of the revisions to the original plan, and suggestions for elements to help retain that rural character by, for example, retaining the original historic building and mature trees and provide landscape elements and smaller parking areas. *August 6, 2014 Summary of Comments, Comment 11, and 12.* The

details of the building styles and landscaping will be developed during the site plan review. *See August 6, 2014 letter, Comment 10.*

The Board considered the recommendations of the City, and included the suggestions for specific building and landscape elements that will help to maintain the rural character of the area. The Court does not find that the Board exceeded its jurisdiction by its actions in considering the recommendations of the City.

To the extent that Plaintiffs assert that the Board exceeded its jurisdiction by not considering the applicable elements of the County's Master Plan, the Court does not find that there was error by the Board. The Board considered the Master Plan – it specifically heard evidence about increased traffic and the lack of a public sewer, and created conditions to meet those concerns that must be met before the new, proposed use of the Trust Property will be allowed.

## **B. Abuse of Discretion**

When reviewing a decision for abuse of discretion, the Court defers to the quasi-judicial body's findings of fact and will only set aside the decision if it "is not reasonably supported by any competent evidence in the record." *Widder*, 85 P.3d at 526. If the ultimate decision "is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority," it lacks competent evidence and should be overturned. *Ross*, 713 P.2d at 1309. Again, the Court's role is not to make new findings of fact or to reweigh evidence, but rather to determine if any evidence in the record supports the quasi-judicial body's decision. *See O'Dell*, 920 P.2d at 50-51. The fact that some evidence supports a different conclusion does not require the Court to reverse the quasi-judicial body unless there is no evidence to support the decision. *See Martinez*, 992 P.2d at 696.

Plaintiff alleges that the Board abused its discretion in following ways:

1. Finding that the proposed use would be compatible with existing and allowed uses in the surrounding area and be in harmony with the neighborhood;
2. Not finding that the proposal was inconsistent with the County Master Plan based on the comments from the City of Fort Collins; and
3. Not disqualifying Commissioner Gaiter for his alleged *ex parte* communications with the Trust representatives.

Under the abuse of discretion standard, the inquiry is whether competent evidence in the record supports the Board's decision.

### **1. Finding that Application is Compatible with Area**

Plaintiff contends that Board abused its discretion by finding that the proposed use was compatible with existing and allowed uses in the surrounding area, and that the proposed use was in harmony with the neighborhood. Specifically, Plaintiff alleges that the proposed use as a concert/event center is not consistent with the neighboring residential and farm properties. Defendants urge the Court to conclude that the record supports the Board's determination.

Again, the Court's role is not to reweigh evidence or to substitute its judgment for the judgment of the Board, but rather to review the decision and the process to ensure that the Board's decision is supported by evidence in the record. Here, the Court determines that, while there was evidence presented that was to the contrary, there was competent evidence in the record to support the Board's decision. Thus, the Board's determination will not be reversed as an abuse of discretion. Specifically, two of the three Commissioners made specific findings that the proposed project is compatible with the area. The evidence included the location of the proposed venue, which is adjacent to a major state highway that includes significant truck traffic and the anticipated expansion of that highway in the foreseeable future. The evidence presented included that the area had been designated as a blight zone, that there were few connections among the residents who lived there, and that the rafting business had been operating in the area, with auxiliary use of a bar/restaurant, for a number of years without complaints. There was an indication from a number of neighbors that the existing business had provided a gathering area for the residents who live nearby, and that they believed that the proposed use of the Trust land would positively add to the area and would fit in well. The representative of the Trust, in addressing the Board indicated that he expected that the proposed project would improve the character of the area for the better. Commissioner Johnson expressed that he had some concerns, that was persuaded by the number of close-by neighbors who supported the proposal, that the concerns raised regarding noise and parking could be mitigated through the engineering and site plan review, and that given the proximity of Highway 287, "times change" and this is reasonable to expect that this corridor will be a commercial area. Commissioner Gaiter noted that there were a number of positive comments from

people who live in the area about the current rafting business and the proposed expansion and that “a whitewater rafting company getting a little bigger will not have anywhere near the impact of a big Walmart.” December 22, 2014 Hearing Transcript, at 153-54. Commissioner Donnelly disagreed with his colleagues on the compatibility issue and noted that with the development of the highway and the expansion of the sewer line to that area, the nature of the community where the subject property is located will change, but that that was not the situation at present. Commissioner Donnelly was concerned about the capacity of the proposed venue.

The fact that Commissioner Donnelly did not concur with his colleagues on the key issue of compatibility does not lead the Court to conclude that the Board abused its discretion. There is sufficient competent evidence in the record to support the determination that the proposed use is compatible with the existing area. And, notably, a number of residents from the area support the proposed use, and indicate their view that the use is compatible. As argued by Plaintiff, the number of citizens who speak out for or against a proposal like this is not determinative of the issue; the Court agrees. But those statements provide some information in the record upon which the Commissioners can, and did, rely upon in reaching their individual and collective determinations regarding this proposal. Under the standard the Court is to apply, that is, whether there is competent evidence in the record to support the determination by the Board, the Court determines that there was, and therefore the Court does not find that there was an abuse of discretion by the Board in finding that the proposed use is compatible and harmonious with the area.

## **2. Finding that the Proposed Use is Consistent with the GMA District**

In addition to arguing that the Board’s action exceeded its jurisdiction in regard to the GMA requirements, Plaintiff also argues that the Board’s decision was an abuse of discretion. As noted above, the Board considered the recommendations and adopted at least some of the recommendations in its approval of the project, particularly those that would serve to maintain the unique rural character through site planning and building design. Further, by establishing the conditions that the Board imposed requiring public sewer and installation of a right-hand turn lane before the proposed use may begin, the Board shows that it considered the applicable elements of the County’s Master Plan. Accordingly, the Court does not find that the Board

abused its discretion in finding that the proposed use is consistent with the GMA district.

### **C. Comments of Commissioner Gaiter regarding contact with the applicants**

At the December 22, 2014 hearing, Commissioner Gaiter described a conversation that he had had with the applicants “way back when – when they were going through their special exception....” He noted that at the time they came in and spoke to him, “nothing was up for review” and they were getting frustrated with the process they had been pursuing. Commissioner Gaiter stated: “And that was the first time we talked about, well, you can go through this series of hurdles, and I said, there’s no guarantee that you’ll get it. We’re pretty crystal-clear about that. But that you’ll have to go through the zoning, and then you’ll have to go through the special reviews and get all of that done.”

Plaintiff asserts that these comments reflect an abuse of discretion, and that Commissioner Gaiter was improperly advising the applicants about their proposed use before the public hearing, suggesting that he had arrived at the hearing with his mind made up. The Court does not find that the evidence in the record rebuts the presumption of integrity, honesty and impartiality of those public officials who serve in a quasi-judicial capacity. *Wells v. Del Norte School District C-7*, 753 P.2d 770, 772 (Colo. App. 1987)(lunch conversations between hearing officer and the attorney for the school board and a witness during a break in the hearing undermined the appearance of impartiality in connection with the hearing process and entitled teacher to new termination hearing). Here, the record before the Court indicates that Commissioner Gaiter disclosed that he had discussed potential processes for the landowners regarding development if they chose to do so. Although the date of the discussion was not identified, the discussion was “way back when,” before there was an application was pending. Commissioner Gaiter stated that he had told them “there’s no guarantee that you’ll get it,” and that the applicants would have to go through the process and get “all of that done.” The Court has carefully reviewed the transcript of the December 22, 2015 hearing and does not find any evidence in the record that Commissioner Gaiter had come into the hearing with a decision in mind, or that he acted improperly in making the general statements of identifying a process to constituents that may be available to them through the County. As such, the Court

does not find that there has been a showing that rebuts the presumption of integrity, honest, and impartiality so as to void Commissioner Gaiter's vote on the project.

## **VI. Conclusion**

For the reasons addressed above, the Court concludes that the Board did not exceed its jurisdiction or abuse its discretion when it approved the proposal submitted by the Modesitt Trust Property/Mountain Whitewater Descents. The Court finds that there is competent evidence in the record to support the determination by the Board. Therefore the Rule 106 Petition is respectfully denied.

SO ORDERED this 28<sup>th</sup> day of August, 2015

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Julie Kunce Field', written over a horizontal line.

Julie Kunce Field  
District Court Judge