Exhibit A

SUMMARY
May 3, 2018

2018COA65

No. 17CA0696 Stor-N-Lock Partners # 15 v City of Thornton — Administrative Law — Judicial Review — C.R.C.P. 106 — Review of Governmental Body Exercising Judicial or Quasi-Judicial Functions

In this C.R.C.P. 106 action, the division first concludes that the record contains competent evidence to support the City of Thornton's approval of a specific use permit allowing development of a vacant parcel located adjacent to appellant's commercial property.

On consideration of the cross-appeal, the division rejects appellee's proposed rule that in every Rule 106 action involving a land use approval, even where no injunction is sought, a plaintiff must post a bond or other security because the mere filing of the action effectively enjoins the defendant from using its property. The

division concludes that such a rule is inconsistent with the language of C.R.C.P. 106 and 65 and the relevant case law.

Accordingly, the division affirms the district court's judgment.

COLORADO COURT OF APPEALS **2018COA65**

Court of Appeals No. 17CA0696
Adams County District Court No. 16CV30215
Honorable Emily E. Anderson, Judge

Stor-N-Lock Partners # 15, LLC, a Utah limited liability company,

Plaintiff-Appellant and Cross-Appellee,

v.

City of Thornton, Colorado; and City Council of the City of Thornton, Colorado,

Defendants-Appellees,

and

Resolute Investments, Inc., a Colorado corporation; and Qwest Corporation, a Colorado corporation,

Defendants-Appellees and Cross-Appellants.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE HARRIS
Loeb, C.J., and Taubman, J., concur

Announced May 3, 2018

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Otten, Johnson, Robinson, Neff & Ragonetti, P.C., Brian J. Connolly, Bill E. Kyriagis, Denver, Colorado, for Defendants-Appellees and Cross-Appellants Resolute Investments, Inc., and Qwest Corporation

¶ 1 Plaintiff, Stor-N-Lock Partners #15, LLC, owns a self-storage facility located in the City of Thornton. The Stor-N-Lock facility is located next to vacant property. Defendant,[1] Resolute Investments, Inc. (Resolute), contracted to buy the vacant property, then sought a specific use permit from the City to operate a self-storage facility there. The City granted the permit.

¶ 2 Stor-N-Lock appealed the City's decision to the district court under C.R.C.P. 106, and the district court affirmed.

¶ 3 As it did in the district court, Stor-N-Lock argues here that the City failed to understand that, in accordance with its own zoning regulations, the permit could not be granted unless the City found that Resolute's use of the property as a self-storage facility actually enhanced Stor-N-Lock's property. And, its argument continues, there was no evidence in the record to support such a finding.

¶ 4 We conclude that the record supports a finding that Resolute's use of the property would benefit Stor-N-Lock, and so we need not delve into the City's alleged misunderstanding of its zoning regulations.

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[1] The other defendants are the City of Thornton, the City's City Council, and Qwest Corporation (the owner of the vacant land).

¶ 5 On cross-appeal, Resolute raises the novel argument that, although Stor-N-Lock did not seek a preliminary injunction, and the district court did not enjoin Resolute's use of the property in any way, Stor-N-Lock should nonetheless have been ordered to post a bond when it initiated its Rule 106 action in the district court. According to Resolute, the mere filing of the action increased the financial risk associated with the project, thereby creating an "effective stay" of its development plan. We reject that argument as inconsistent with C.R.C.P. 106 and 65 and unsupported by any authority.

¶ 6 Accordingly, we affirm the judgment of the district court.

I. Background

¶ 7 Since 1998, Stor-N-Lock has operated its 616-unit self-storage facility in an area of the City zoned for industrial uses. Stor-N-Lock's immediate neighbors include a school, an office building, and a manufacturing facility.

¶ 8 Directly to the south of Stor-N-Lock's facility is a five-acre parcel of undeveloped, vacant land. In 2015, after contracting to buy the property, Resolute submitted an application for a development permit and a specific use permit, seeking approval to

develop the vacant land into a 1000-unit self-storage facility. (Though an industrial zone is the only area in which a self-storage facility may be located, a specific use permit is required.)

¶ 9 Under the City's zoning regulations, a specific use permit may be issued if the proposed use will

> (a) Complement or be compatible with the surrounding uses and community facilities;
>
> (b) Contribute to, enhance, or promote the welfare of the area of request and adjacent properties;
>
> (c) Not be detrimental to the public health, safety, or general welfare;
>
> (d) Conform in all other respects to all applicable zoning regulations and standards; and
>
> (e) Be in conformance with the [City's] Comprehensive Plan.

Thornton City Code § 18-52(a)(4).

¶ 10 The City's planning staff submitted a report and recommendation regarding Resolute's application to the Development Permits and Appeals Board (Board), the entity that issues development and specific use permits. The planning staff's report recommended that the Board issue the specific use permit because, among other reasons, "[t]he proposed self-storage mini-

warehouse use will complement and be compatible with the surrounding land uses such as another self-storage mini-warehouse, an office building, and a manufacturer."

¶ 11 After holding a public hearing, the Board unanimously approved Resolute's request for the specific use permit,[2] finding that "[t]he proposed use will contribute to, enhance, and promote the welfare of the area of the request and adjacent properties by developing a vacant infill parcel," which would benefit "adjacent properties by presenting a robust and fully developed commercial area."

¶ 12 Stor-N-Lock then appealed the Board's decision to the City Council. In anticipation of a second public hearing, the City's planning staff prepared another report and recommended that the City Council uphold the Board's decision. In that second report, the planning staff noted Stor-N-Lock's concern that Resolute's proposed use would hurt Stor-N-Lock's business by creating an "over-supply [of storage units] in the market," but advised the City

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[2] The Board also approved Resolute's request for a development permit. Stor-N-Lock did not appeal that decision.

Council that "[p]otential competition is not a basis on which to deny a Specific Use Permit."

¶ 13 At the City Council's public hearing, the City's planning manager testified that Resolute's proposed use would "foster the development of the area" and benefit adjacent properties "by presenting a robust and fully developed commercial center." The City Council also received testimony and written submissions from representatives of Resolute and Stor-N-Lock.

¶ 14 At the conclusion of the hearing, the City Council affirmed the Board's decision. In its resolution, the City Council agreed with the Board's findings concerning the benefit of the proposed use to the adjacent properties:

> The proposed use will contribute to, enhance, and promote the welfare of the area of the request and adjacent properties by developing a vacant infill parcel. The incidental benefits of developing a vacant parcel of land is [sic] an enhancement to the community as a whole by giving citizens more choices and adjacent properties by presenting a robust and fully developed commercial area.

¶ 15 Stor-N-Lock then filed this C.R.C.P. 106(a)(4) action in district court, contending that the City Council had abused its discretion in construing the adjacent properties criterion to require only a

showing of a benefit to "the community as a whole," and that the record did not support a finding that the property's proposed use as a self-storage facility would benefit Stor-N-Lock.

¶ 16 While the case was pending in district court, Resolute filed a motion to require Stor-N-Lock to post a bond, on the theory that, by filing the Rule 106 action, it had effectively obtained an injunction. The district court summarily denied the motion.

¶ 17 Subsequently, in a careful, thorough order, the district court found that the City Council had not abused its discretion in affirming the Board's decision to grant a specific use permit:

> The Court finds the record supports City Council's decision regarding consideration of other adjacent property criteria. The record shows that the proposed use will develop a long vacant property, encourage business and industrial growth in the area, have minimal construction impacts as it does not require new roads or additional infrastructure to support the use, a pedestrian sidewalk will provide access to adjacent developments, the project will improve the aesthetics of the property with landscaping, [and] its design will complement adjacent structures, give the surrounding community more choices, low traffic impact, and an important amenity for other uses in the area.

¶ 18 Stor-N-Lock appeals the district court's judgment, asking us to determine that the City Council should not have approved the permit. Resolute cross-appeals the denial of its motion to require a bond.

II. The Specific Use Permit

¶ 19 On appeal, Stor-N-Lock reasserts its challenge to the City Council's finding concerning the adjacent properties criterion. According to Stor-N-Lock, the City Council construed this criterion too broadly, imposing on Resolute a lesser burden to show only that the overall development plan for the property, rather than the specific use of the property as a self-storage facility, would benefit Stor-N-Lock. Under a proper construction of the criterion, Stor-N-Lock contends, the City Council should have denied the permit because there was no evidence in the record that Resolute's actual proposed use would contribute to, enhance, or promote the welfare of Stor-N-Lock.

¶ 20 We conclude that the record supports the City Council's decision under Stor-N-Lock's interpretation of the criterion; therefore, we need not resolve any dispute about its meaning.

A. Standard of Review

¶ 21 Under Rule 106(a)(4), we review the decision of the governmental entity itself, rather than the district court's determination regarding that decision. *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 9.

¶ 22 Still, we emphasize that our task is a limited one. In reviewing the City Council's decision, we apply the same standard of review applied by the district court. *Id.* Under this deferential standard, we may not disturb a governmental body's decision absent a clear abuse of discretion. C.R.C.P. 106(a)(4)(I); *Ford Leasing Dev. Co. v. Bd. of Cty. Comm'rs*, 186 Colo. 418, 425, 528 P.2d 237, 241 (1974). Unless it applied an erroneous legal standard (and here, we are applying Stor-N-Lock's legal standard), a governmental entity abuses its discretion only if no competent evidence in the record supports its ultimate decision. *City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995). "'No competent evidence' means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986).

¶ 23 Here, the City Council affirmed the Board's grant of the specific use permit. That decision turned on its determination that section 18-52(a)(4)'s criteria were satisfied, including the adjacent properties criterion.

¶ 24 Thus, our task is to identify whether *any* evidence in the record supported the City Council's finding that Resolute's use of the property as a self-storage facility will contribute to, enhance, or promote the welfare of Stor-N-Lock's adjacent property.

B. Competent Record Evidence Supports the City Council's Decision

¶ 25 In its resolution affirming the Board's decision, the City Council explained that Resolute's proposed use satisfied the adjacent properties criterion because the proposed use would "develop[] a vacant infill parcel." Stor-N-Lock says this finding demonstrates that the City Council did not consider the effect of the *actual* proposed use (as a self-storage facility) on adjacent properties because *any* proposed use would develop the infill parcel.

¶ 26 In our view, Stor-N-Lock's reading of the resolution is too narrow. The City Council found that the development of the vacant property would contribute to, enhance, and promote the welfare of

"the area of application and adjacent properties" through the development of the vacant parcel. Next, the resolution stated that development of the vacant land would be an "enhancement to the community as a whole," by creating "a robust and fully developed commercial area." We understand the term "community as a whole" to include both the area of application and the adjacent properties, as those terms had just been referenced in the preceding sentence. Thus, we read the resolution to mean that the actual use of the property as a self-storage facility would benefit the adjacent properties, including Stor-N-Lock, by creating a robust and fully developed commercial area. In fact, that finding is most applicable to Stor-N-Lock; the adjacent school, for example, is less likely to benefit from its location in the midst of a robust and fully developed commercial area.

¶ 27 In any event, as the City points out, we are not bound by the language of the resolution itself. Our task is not to evaluate the thoroughness of the City Council's subsidiary findings; our task is to examine the record to ensure that some evidence exists to support the City Council's ultimate decision. *See Sundance Hills Homeowners Ass'n v. Bd. of Cty. Comm'rs*, 188 Colo. 321, 328-29,

534 P.2d 1212, 1216 (1975); *see also Bd. of Cty. Comm'rs v. O'Dell*, 920 P.2d 48, 52 (Colo. 1996) (In a Rule 106 action, the court is "required to uphold the Board's conclusions if such conclusions [are] supported by competent evidence.").

¶ 28 We conclude that, even if we were to disregard the findings included in the resolution, there is some evidence in the record to support the City Council's determination that the proposed use of the property would contribute to, enhance, or promote the welfare of adjacent properties.

¶ 29 First, there was testimony that the proposed use of the property as a self-storage facility would create "synergistic" benefits for both Resolute and Stor-N-Lock. Resolute's marketing expert, a former real estate developer, testified that it is "very common" to encourage development of similar land uses in the same general area: "[H]otels tend to go with hotels. Storage tends to go next to storage. Retail tends to go next to retail. Office buildings tend to go next to office buildings." He presented twenty-five examples of "storage next to storage or within two blocks" in the Denver metropolitan area. Even a council member who ultimately voted against upholding the issuance of the permit acknowledged the

synergies that arise from placing similar businesses in close proximity: "McDonald's on one corner and a Taco Bell on another corner . . . actually promote[] each other because they attract . . . traffic to that particular intersection . . . [which] brings in more clients."

¶ 30 Second, there was testimony that the use of the property as a self-storage facility would benefit Stor-N-Lock because, unlike other commercial uses, a self-storage facility was a "relatively low impact use." One of Resolute's representatives testified that, based on the nature of the property's proposed use as a storage facility, construction impacts would be "minimal," thereby decreasing disruption to neighboring businesses.

¶ 31 Stor-N-Lock suggests that the quality of this evidence was insufficient to outweigh its own competing evidence that a self-storage facility would adversely affect its business. For example, Stor-N-Lock says, while Resolute's representative testified in vague terms about an unmet demand for additional storage in the area, Stor-N-Lock presented undisputed evidence that its storage facility had never reached maximum occupancy. And a Stor-N-Lock representative testified that Resolute's use of the adjacent property

would mean the loss of a right-of-way used to maintain a boundary wall.

¶ 32 But it was the City Council's job to evaluate the probative value and weight of all of the evidence and to decide the best use of the property using its own judgment. *See Dolan v. Fire & Police Pension Ass'n*, 2017 COA 55, ¶ 32 (dismissing plaintiff's argument that the evidence was "incompetent," because a challenge to the quality of the evidence "presents a question of probative value and weight left to the discretion of the Board"). And, in weighing the evidence, the City Council was not required to make explicit findings as to Stor-N-Lock's contrary evidence. *See Colo. State Bd. of Med. Exam'rs v. Ogin*, 56 P.3d 1233, 1238 (Colo. App. 2002). Nor was it required to give weight to Stor-N-Lock's concern that a competing self-storage facility would hurt its bottom line. *Westwood Meat Market, Inc. v. McLucas*, 146 Colo. 435, 439, 361 P.2d 776, 778 (1961) ("Zoning may not be used as a means of stifling proposed competition.").

¶ 33 We, of course, may not reweigh the evidence and substitute our judgment for that of the City Council. *O'Dell*, 920 P.2d at 50. When the "issues argued [are] fairly debatable," *Sundance Hills*, 188

Colo. at 328, 534 P.2d at 1216, we must accept the relative weight given to conflicting evidence by the governmental entity. *See Alpenhof*, ¶ 20. We do not sit as a zoning board of appeals. *Id.*

¶ 34 We conclude that the evidence in the record was sufficient to clear Rule 106(a)(4)'s low no-competent-evidence bar. Accordingly, we discern no abuse of discretion by the City Council.

III. Resolute's Motion to Require A Bond

¶ 35 While this action was pending in the district court, Resolute moved for an order requiring Stor-N-Lock to post a bond. Resolute says that in every Rule 106 action involving a land use approval, a plaintiff must post a bond because the mere filing of the action effectively enjoins the defendant from using its property.

¶ 36 Resolute seeks reversal of the district court's order denying its motion and the retroactive imposition of a bond. And, because it has suffered damages from the delay caused by Stor-N-Lock's appeals, Resolute says that it would be entitled to recover some or all of a retroactively posted bond.

A. Mootness

¶ 37 We first address Stor-N-Lock's argument that Resolute's cross-appeal is moot. Stor-N-Lock contends that, even if we were to agree

with Resolute's position that a plaintiff challenging a land use decision under Rule 106 must post a bond, under analogous federal case law, we could not require the imposition of a retroactive bond. Therefore, Stor-N-Lock asserts, we cannot grant Resolute any relief, and the issue is moot. That argument misconstrues the mootness doctrine.

¶ 38 An issue is moot when the relief sought, *if granted*, would have no practical effect on an existing controversy. *See People in Interest of C.G.*, 2015 COA 106, ¶ 12. Under those circumstances, any opinion would be advisory only, and we must avoid issuing advisory opinions. *See People in Interest of Vivekanathan*, 2013 COA 143M, ¶ 14.

¶ 39 But here, the relief sought by Resolute is, essentially, an order that a bond must be posted in this case. Stor-N-Lock might be right on the merits — most courts have held that a bond securing an injunction cannot be retroactively increased upon dissolution of the injunction, *see, e.g.*, *Sprint Commc'ns Co. L.P. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 241 (3d Cir. 2003) — but we do not resolve the merits as part of the mootness inquiry. In other words, we do not ask whether the relief sought *should* be granted. Rather, we

assume that the appealing party is entitled to the "relief sought," and then we ask whether obtaining the relief would matter. If not, the case is moot.

¶ 40 Obtaining the relief it seeks would matter to Resolute, though. If it prevailed, Stor-N-Lock would have to post a bond and the bond would be available to cover any damages from the supposed de facto wrongful injunction imposed through the initiation of the Rule 106 action. *See id.* at 240 (A bond under Fed. R. Civ. P. 65 "provides a fund to use to compensate incorrectly enjoined defendants." (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989))).

¶ 41 Thus, we conclude that the issue is not moot. And so we turn to the merits of Resolute's cross-appeal.

B. Standard of Review

¶ 42 Whether Rule 106(a)(4) may be construed to require the plaintiff to post a bond, in conjunction with C.R.C.P. 65, in every land use case is a question of law that we review de novo. *Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 7. We interpret rules of procedure in the same manner as a statute, giving words their commonly understood and accepted meanings. *Id.*

C. A Plaintiff Is Required to Post a Bond Only When a Restraining Order or Preliminary Injunction Has Been Entered

¶ 43 Rule 106(a)(4) allows a party to seek review of the decision of a governmental body. Under subsection (a)(4)(V), the "proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure." C.R.C.P. 65, in turn, governs the issuance of temporary restraining orders and preliminary injunctions. Thus, in the context of a Rule 106 proceeding, a plaintiff *may* seek a temporary restraining order or preliminary injunction under Rule 65 to "stay . . . the effect of an adverse decision" by the governmental body. *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 284 (Colo. 1995).

¶ 44 The party seeking injunctive relief must post a bond or other security:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

C.R.C.P. 65(c); *see also Apache Vill., Inc. v. Coleman Co.*, 776 P.2d 1154, 1155 (Colo. App. 1989) (court's failure to require plaintiff to post a bond or other security invalidated injunction).

¶ 45 Under the plain language of Rule 65(c), the bond is intended to provide a remedy for a party "who is found to have been wrongfully enjoined or restrained" by an injunction or restraining order. *See Kaiser v. Mkt. Square Disc. Liquors, Inc.*, 992 P.2d 636, 643 (Colo. App. 1999).

¶ 46 Here, as Resolute concedes, its use of the property was not "enjoined or restrained" under Rule 65 because Stor-N-Lock did not seek, and the district court did not enter, a preliminary injunction or a temporary restraining order. Thus, there could be no occasion to determine whether it had been "wrongfully" enjoined or restrained from using the property, and no need for a remedy in the event of such a wrongful restraint.

¶ 47 That would seem to resolve the question. But Resolute insists that Stor-N-Lock's mere initiation of an action under Rule 106 increased the financial risk of proceeding with Resolute's development plan to such a degree that it was "effectively enjoined" by the litigation itself.

¶ 48 The majority of its briefing describes, persuasively, how the litigation has increased the financial risk associated with developing the property. Resolute reminds us that, under Colorado law, if the defendant proceeds in accordance with its permit, and the governmental entity's decision to issue the permit is subsequently reversed, the defendant may be precluded from further development or even required to remove completed improvements. *See Russell v. City of Central*, 892 P.2d 432, 436 (Colo. App. 1995) (holding that Rule 106 action to invalidate permit was not moot even though defendant had completed construction under a then-valid permit). *But see Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353 (Colo. 1986) (deciding that Rule 106 action was moot where plaintiff failed to seek injunctive relief and the defendant had completed construction of its facility).

¶ 49 We are not unsympathetic to Resolute's predicament, but we must reject its attempt to equate an order that renders certain conduct legally impermissible with a lawful review process that renders legally permissible conduct more expensive. It is undisputed that Resolute may proceed with development of the property. If it chooses not to, based on its own subjective cost-

benefit analysis, it may not seek damages (in the form of a forfeited bond) as a consequence of that choice.

¶ 50 Moreover, the bond requirement "is an exception to the norm in American litigation that the parties bear their own costs and expenses." *Mead Johnson & Co. v. Abbott Labs.*, 209 F.3d 1032, 1033 (7th Cir. 2000). If we read a bond requirement into every land use case filed under Rule 106(a)(4), even when no injunction has been requested, the exception would, if not swallow, at least infringe, to an unacceptable degree, on the rule.

¶ 51 In the absence of some persuasive textual argument or some controlling authority (and Resolute has provided neither), we are not free to disregard the plain language of Rules 106(a)(4) and 65 and our own case law interpreting those rules.

¶ 52 We note that defendants are not without any remedy against a plaintiff who files an appeal — whether under Rule 106 or otherwise — for the sole purpose of delaying the litigation. Under C.A.R. 38 and 39.1, a party may seek "damages," including attorney fees and double costs, if an appeal is frivolous. *See Calvert v. Mayberry*, 2016 COA 60, ¶¶ 46, 49 (*cert. granted* Feb. 13, 2017). Resolute, though, has not alleged that Stor-N-Lock's appeal is frivolous.

¶ 53 We conclude that the district court did not err in denying Resolute's motion to require security.

IV. Conclusion

¶ 54 The judgment is affirmed.

CHIEF JUDGE LOEB and JUDGE TAUBMAN concur.