DISTRICT COURT, ELBERT COUNTY, COLORADO 751 Ute Street Post Office Box 232 Kiowa, Colorado 80117 Presently located at: Douglas County Justice Center 4000 Justice Way Castle Rock, Colorado 80104	**COURT USE ONLY** Case Number: 07CV48 Div.: 1
CITIZENS FOR RESPONSIBLE GROWTH, ELBERT COUNTY, a Colorado nonprofit corporation; LAURA E. SHAPIRO; and JOHN T. DORMAN, Plainitffs; vs. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ELBERT, State of Colorado; and RCI DEVELOPMENT PARTNERS, INC., Defendants.	

ORDER

THIS MATTER comes before the court on a request for review pursuant to C.R.C.P. Rules 106 and 57. The court has reviewed the record, the parties' briefs and makes the following findings of fact, conclusions of law and orders:

STATEMENT OF THE CASE

In September, 2006 defendant RCI Development Partners, Inc. (hereafter RCI) submitted three applications to the Elbert County Planning Department in connection with a new land development in Elbert County called Spring Valley Vistas (hereafter Development). These applications sought to: 1) rezone the land to a Planned Unit Development (hereafter PUD); 2) obtain a "1041 permit" to establish a new community under Elbert County's Guidelines and Regulations for Areas and Activities of State Interest (also referred to as Elbert County 1041 Regulations, hereafter 1041 Regulations); and 3) approve a subdivision that provides for residential, commercial and public uses. The Elbert County Planning Commission held public hearings and

approved the applications. The defendant Board of County Commissioners of the County of Elbert (hereafter Board) held public hearings on January 3rd and 4th, 2007. Apparently many interested members of the public attended the hearings and the majority who spoke opposed the Development. At the conclusion of the hearings the Board granted the applications and approved both the rezoning and the subdivision and granted the 1041 permit. The resolution that memorialized their decision was recorded on January 17, 2007. The approvals permit the construction of up to 3,000 residential units on the property .

On February 16, 2007 the plaintiffs filed this action seeking judicial review of the Board's decision.

LEGAL ANALYSIS

In a C.R.C.P. Rule 106 proceeding the court is asked to review the decision of a governmental body exercising judicial or quasi-judicial functions. In doing so the court's review is limited to a determination of whether the body has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before that body. C.R.C.P. 106(a)(4)(I). Quasi-judicial functions involve the "determination of rights, duties, or obligations of specific individuals by applying existing legal standards to past or present facts to resolve the particular interests in question," and would include zoning decisions like those at issue here. Condiotti v. Board of County Commissioners of the County of La Plata, 983 P.2d 184, 187 (Colo. App. 1999).

In this case the court must determine whether the Board exceeded its jurisdiction or abused its discretion in granting RCI's applications with respect to the Development.

A governmental body abuses its discretion when it makes a decision that is not reasonably supported by any competent evidence in the record. Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990); Canyon Area Residents for the Environment v. Board of County Commissioners of Jefferson County, ___ P. 3d ___, 2006 WL 1171863 (Colo. App. 2006). The phrase "no competent evidence" means that the decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Board of County Commissioners v. O'Dell, 920 P.2d 48, 50 (Colo. 1996). In determining the existence of an abuse of discretion the Court may consider whether the body misconstrued or misapplied the applicable law. Van Sickle v. Boyes, 797 P.2d 1267, 1274 (Colo. 1990); Canyon Area Residents for the Environment v. Board of County Commissioners of Jefferson County, supra.

The plaintiff's first contention is that the Board exceeded its jurisdiction and abused its discretion by approving a housing density in the Development that exceeded the density limits prescribed in the Elbert County Master Plan.

In November, 1996 Elbert County adopted a master plan and subsequently amended it. The Development is 2,370 acres in size and is located in what is called a Rural Residential-High Density Land Use Area. Master Plan, pp. 36 & 40. According

to the master plan the normal density of residential units permitted in an area of this size and classification is 720. There is, however, a provision in the plan that permits the normal densities to be exceeded if certain conditions are met. "Density Bonuses" are available when: 1) all the dwelling units in the development are proposed to be served by a central water and sewer system...; 2) when the central sewer system contains a water reuse effluent which is capable of being utilized for irrigation purposes and the development plan contains an irrigation system for reuse water which services irrigation needs of parks, streetscapes, open spaces, entryway monumentation or other recreational areas...; 3) and when all of the conditions listed in numbers one and two are met and the irrigation system is also provided to each dwelling unit for outside irrigation purposes... Master Plan, pp. 41-44. Under these criteria the Development qualified for density bonuses that permitted an additional 540 residential units or a total of 1260 units.

The Board's Resolution approving RCI's application authorized 3000 residential units instead of 1260. RCI requested and the Board approved two additional density bonuses totaling 1,740 units. The first of these bonuses was 637 units in return for constructing 7.5 miles of county roads. The second was 1,103 units for the purchase of water rights by RCI from the Arapahoe County Water and Wastewater Authority. There is no provision for these density bonuses in the master plan. The resolution justified the density bonus for the road construction, not by reference to the master plan, but on the basis of a "precedent" established by the grant of a similar bonus in connection with a different subdivision. The resolution did not cite any authority for the award of a density bonus in connection with the purchase of water rights.

The actions of government bodies are limited by controlling legislation. Prior actions that exceed the authority conferred upon them do not constitute precedential exceptions legitimizing future deviations from the limitations of their power. Neither the master plan nor any other authority cited to this court empowered the Board to approve the two density bonuses that more than doubled the permissible size of the Development. Clearly then, if the Board is restricted by the master plan, it exceeded its authority and abused its discretion by approving a development the size of which was more than double permissible limits.

The question the court must decide, therefore, is whether the Board is bound by the provisions of the Elbert County Master Plan. "Conceptually a master plan is a guide to development rather than an instrument to control land use," and it is "generally held to be advisory only." Theobald v. Board of County Commissioners, 644 P.2d 942, 946, 951 (Colo. 1982). However, the necessity for complying with the requirements of a master plan prevail over the general rule that it is only advisory, if: 1) there is formal inclusion of sufficiently specific master plan provisions in a duly-adopted land use regulation by a board of county commissioners, or 2) a statutory directive from the General Assembly that landowners must comply with master plan provisions in pursuing land use development proposals. Board of County Commissioners of Larimer County v. Conder, 927 P.2d 1339, 1346 (Colo. 1996); Condiotti v. Board of County Commissioners of the County of La Plata, supra.

Mere adoption of a master plan by a county planning commission is inadequate to impose a master plan compliance requirement on land use development proposals. That is because a planning commission is appointed by the board of county commissioners. Its members are not elected by the people who live in the affected jurisdiction and they are not a legislative body that affords affected landowners due process including proper notice and hearing when they adopt a master plan. Id., (citing Theobald, 644 P.2d 948-950.) In this case, however, the Board when it adopted land use regulations for Elbert County including subdivision regulations, zoning regulations and 1041 regulations, included master plan compliance requirements. 1

The Elbert County Subdivision Regulations require that in the review of all preliminary plat, final plat and minor development applications the Board is to consider if the application is " in compliance with the requirements of these regulations, the Elbert County Zoning Regulations and the Elbert County Master Plan." Subdivision Regulations at 2. The Subdivison Regulations at 22 also provide that the "detailed review [at the preliminary plat stage] will help determine if the plan complies with the County Master Plan, zoning requirements and subdivision regulations." Requirements for compliance with the master plan are included in the zoning regulations relating to approval of rezoning. In the submission requirements for rezoning the applicant must explain, "compliance of the proposed rezoning with the Elbert County Master Plan." Zoning Regulations, Part I, Sec. 6 (A)(1)(b)(3)(g). In the standards for approval the Planning Commission and the Board must consider "whether the proposed rezoning complies with the requirements of the Elbert County Master Plan." Id.,Part I, Sec. 6 (B)(2)(b)(3)(a). In applying for PUD rezoning the applicant must submit a development guide and, "The development guide shall reflect the goals and policies of the Elbert County Master Plan." Id., Part II, Sec. 16 (C)(2)(a) & (d).

The Elbert County 1041 Regulations state that, "...it is the general intent to encourage development in a manner which is consistent with the County's Master Plan." 1041 Regulations, 4-101(1). And, the County may grant a 1041 permit for a new community only if the "nature and location or expansion of the new community complies with the intent of all applicable provisions of the Master Plan of this county..." Id., 4-307(1)(d).

Because Elbert County has included master plan compliance provisions in its legislatively adopted subdivision regulations, zoning regulations and 1041 regulations their master plan is no longer merely an advisory document, but sets forth mandatory requirements that must be observed. This is true so long as the master plan provisions at issue are drafted with sufficient exactitude so that the proponents of a new development are afforded due process, the county does not retain unfettered discretion and the basis for the county's decision is clear for purposes of reasoned judicial review. Board of County Commissioners of Larimer County v. Conder, supra, p. 1350-1351.

1 Neither side in this case has contended that the Elbert County subdivision regulations, the zoning regulations or the 1041 regulations were not properly adopted by the Board. Both sides have referenced those regulations and implicitly acknowledged their validity. Therefore, the Court accepts that they were duly adopted for purposes of its decision in this matter.

The provisions of the master plan at issue here are clear, easily understandable statements of the permissible density for residential units based upon the size of the property involved. The basis on which "bonus density" awards can be made is set forth with specificity and is not vague and does not allow for application in an inconsistent manner from case to case. The pertinent provisions of the plan contain adequate standards that adequately apprise all parties of their respective rights and include sufficient bench marks for measuring administrative action upon judicial review. The Court finds that due process is afforded here and therefore the Board is bound by the provisions of the Elbert County Master Plan.

In their opening brief plaintiffs also contend that compliance with the Elbert County Master Plan is required because the state legislature has made it binding on PUDs by enactment of the Planned Unit Development Act of 1972. C.R.S. 24-67-102, et seq. In their answer briefs defendants correctly observe, however, that C.R.S. 2-67-107(2) provides that: "Any county...which has enacted, prior to May 21, 1972, a resolution or ordinance providing for planned unit developments may continue to follow the provisions established therein, and any amendments thereto in lieu of electing to follow the provisions of this article." In the appendix to their brief defendant RCI provides an affidavit supporting their contention that Elbert County had enacted a resolution for planned unit developments prior to May 21, 1972. Plaintiffs do not dispute this in their reply brief and the court finds that Elbert County is not obligated to follow the provisions of the Planned Unit Development Act.

The plaintiff's next contention is that the Board abused its discretion by misapplying the requirements regarding the 1041 Regulations' aquifer life standards. One of the applications submitted to the Board by RCI was to obtain a 1041 permit as a new community. In order to obtain such a permit both state law and Elbert County's regulations require that the developer demonstrate that the Development has an adequate water supply. 30-28-133(3)(d), C.R.S.; 1041 Regulations, 4-101(8) & 4-307(1)(h); Subdivision Regulations, Sec. VIII (D)(23); Zoning Regulations, Part II, Sec. 16(C)(3)(b). In determining what constitutes an adequate water supply Elbert County's 1041 regulations provide, in pertinent part, that:

> (a) In order to assure a long term water supply, and given the concern with dependence on bedrock ground water, and the difficulty in supplying future surface sources outside the urbanized areas, the following additional criteria apply:
>
> i) .....
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> ii) If greater than 50% of the water supply is a renewable source of water, then a 100 aquifer year life will be applied.
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> iii) If less than 50% of the water supply, but greater than 25% of the water supply, is a renewable source of water, then a 200 year life will be applied.

iv) If less than 25% of the water supply is a renewable source of water, then a 300 year life will be applied. 1041 Regulations, 4-307(2)(a)(ii-iv).

In essence this provision allows for the size of a development to be increased in proportion as its water needs are shown to be supplied by sources other than the bedrock ground water. These criteria are mandatory and the regulations provide that the Board shall deny the permit if the proposed development does not comply with them. Id., 4-307(3).

RCI identified two sources for its water supply, the non-tributary ground water beneath the development and that same water which, once used, would be treated and then exchanged for alluvial water from Running Creek and reused. This second source, they submitted, constitutes renewable water and that it will provide 54% of the water supply for the Development. As a result they asked the Board to determine that they were entitled to have the 100 year depletion rate or aquifer year life standard apply to the Development, and the Board agreed.

Plaintiffs contend that the only water that RCI is actually relying upon for the Development is the non-tributary ground water and that the reuse or exchange of that water for other water in Running Creek is not a renewable source of water within the meaning of the regulation. As a result the Board should have applied the 300 year depletion rate or aquifer life standard to the Development.

The question the court must decide, therefore, is what does the term "renewable source of water" mean in the context of this regulation. Courts interpret the ordinances of local governments, including zoning ordinances, as they would any other form of legislation. Land use regulations are subject to the general canons of statutory interpretation. See Sierra Club v. Billingsley, 166 P.3d 309 (Colo. App. 2007).

In construing an ordinance the court is to ascertain and give effect to the intent of the legislative body. It is to refrain from rendering judgments that are inconsistent with that intent. To determine that legislative intent the court is to look first to the plain language of the ordinance. If it can give effect to the ordinary meaning of words used by the legislative body, the ordinance should be construed as written, being mindful of the principal that the body meant what it clearly said. Words and phrases are to be construed according to common usage and, if the statutory language is clear and unambiguous, the language should not be subjected to a strained or forced interpretation. City of Colorado Springs v. Securcare Self Storage, Inc., 10 P.3d 1244 (Colo. 2000).

The defendants emphasize that there is no definition of "renewable water" in the Elbert County Land Use Regulations and therefore the Planning Department and the Board were required to determine whether the proposal to reuse treated effluent qualified as "renewable water". They also contend that deference on this issue should be accorded to the Elbert County Planning Director and his opinion that the reuse of treated effluent

which would be exchanged gallon for gallon for alluvial water from Running Creek is "renewable water." (Defendant RCI's Answer Brief, pp. 18 & 23).

An administrative agency's interpretation is advisory, not binding on the court. Where the governmental body's interpretation is consistent with generally applied rules of statutory construction, the administrative interpretation is entitled to deference. However, the court is not bound to defer to a decision that misconstrues or misapplies the law. Sierra Club v. Billingsley, supra, p. 312. Stevinson Imports, Inc. v. City and County of Denver, 143 P.3d 1099, 1101 (Colo. App. 2006). Here the defendants' emphasis in interpretation of the regulation is misplaced. They discuss "renewable water", but the regulation is concerned with a "renewable source of water" and that renewable source is distinguished from water drawn from the aquifer.

Section 4-307(2)(a) of the 1041 Regulations plainly states a concern with limitations on the availability of water. It then goes on to recognize the undesirability of dependence on the non-renewable bedrock ground water. It then establishes criteria that must be complied with to avoid dependence on that groundwater. Next, it specifically differentiates between this bedrock ground water (or aquifer water) and other water sources by categorizing the life expectancy of the non-renewable aquifer based on the percentage of a new community's water supply that will come from renewable sources of water.

By its ordinary meaning a source of water that is renewable is one that can be restored or replenished. The only source of water for the Development is the non-renewable ground water. RCI proposed that this same water be reused or traded for other water once it has passed through a sewage treatment system, but ultimately its origin is a non-renewable source and there is no provision for another renewable source of water that will furnish any percentage of the Development's water supply. Therefore, by the plain language of the regulation a 300 year aquifer life should have been applied to this Development.

It should also be noted that the concept of reusing water is a recognized one in the Elbert County land use regulations. As discussed earlier in this opinion density bonuses are awarded in connection with such reuse. Had reuse been intended as an option in the 1041 Regulations, they would have said so. Instead these regulations address a different concept, that of a renewable source of water.

By applying a 100 year aquifer life instead of a 300 year life the Board abused its discretion in this case. The Board also exceeded its jurisdiction and abused its discretion by authorizing a development in which housing density exceeded the limits permitted by the Elbert County Master Plan.

The court, therefore, finds in favor of the plaintiffs. The Board approval of the RCI applications is vacated and this matter is remanded to the Board of County Commissioners of Elbert County for further proceedings consistent with this decision.

DONE AND SIGNED this 30th day of January, 2008.

__Jeffrey K. Holmes_____
District Court Judge