



GRANTED

The moving party is hereby **ORDERED** to provide a copy of this Order to any pro se parties who have entered an appearance in this action within 10 days from the date of this order.

Jeffrey K. Holmes
District Court Judge

DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, ELBERT COUNTY, COLORADO

Court Address: 751 Ute Street, P.O. Box 232
Kiowa, Colorado 80117

Plaintiffs:

CITIZENS FOR RESPONSIBLE GROWTH, ELBERT COUNTY, a Colorado nonprofit corporation; LAURA E. SHAPIRO; and JOHN T. DORMAN

v.

Defendants:

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ELBERT, State of Colorado; and RCI DEVELOPMENT PARTNERS, INC.

Attorney for Board of County Commissioners
of the County of Elbert

REID AND SCHEFFEL, P.C.

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Case Number:

2007 CV 48

Div.: **E** Ctrm:

**DEFENDANT BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF ELBERT'S
MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF
AND SUR-REPLY BRIEF**

Defendant Board of County Commissioners of the County of Elbert (hereinafter the "Board"), by and through Mark H. Scheffel, Elbert County Attorney, hereby requests leave to file a sur-reply brief concerning Plaintiffs' Reply Brief and, as grounds therefore, states as follows:

1. **March 4, 2005 Memorandum.** Plaintiffs attached an exhibit to their Reply Brief a March 4, 2005 document titled, "Memorandum to All County Land Use Planning Directors" (hereinafter the "Memorandum"). Plaintiffs state that the Memorandum was inadvertently not attached to Plaintiffs' Opening Brief. (Reply Brief at page 2). The

Memorandum is not part of the Record in this case; rather, Plaintiffs request this Court take judicial notice of such document pursuant to C.R.E. 201(b). Pursuant to C.R.E. 201(e), Defendants are provided the opportunity to be heard regarding the propriety of this Court taking judicial notice of such document. Defendants respond as follows:

a. Judicial Review under C.R.C.P. 106(a)(4) is limited to the certified record. Therefore, a court may not take judicial notice of documents outside the certified record. See, e.g., *Walker v. City of Thornton*, 525 P.2d 1177 (Colo. App. 1974) (court may not take judicial notice of municipal ordinances). If a court is not permitted to take judicial notice of a County's own ordinances or regulations in a C.R.C.P. 106(a)(4) action, it is certainly not permitted to take judicial notice of a Memorandum dated almost two years prior to the decision at issue, that was not introduced into the record at any hearing and was not referenced in any transcript or documentation of the proceedings. Therefore, the court must disregard the Memorandum in reviewing this case.

2. **July 5, 2006 Letter.**

When Defendants filed their respective Answer Briefs on December 13, 2007, the Court had not yet ruled upon Plaintiffs' then pending Motion to Supplement the Record which sought to include a July 5, 2006 letter from the State Engineer's Office. The Court granted the Motion on December 21, 2007. Defendants now request the opportunity to respond to Plaintiffs' arguments concerning such letter, as follows:

a. Plaintiff's have supplied this document (and the Memorandum discussed above) to the Court in a continued effort to have this Court review *de novo* the Board's decision regarding the water supply for the development. That is not the Court's role in a C.R.C.P. 106(a)(4) action. Rather, this Court's review is limited to determining whether or not there is competent

evidence in the record to support the Board's decision. This Court does not sit as a zoning board of appeals. *Sundance Hills Homeowners Ass'n v. Board of County Comm'rs for Arapahoe County*, 534 P.2d 1212, 1216 (Colo. 1975). *De novo* review of the decision is not permitted. *Hessling v. City of Broomfield*, 563 P.2d 12 (Colo. 1977).

The July 5, 2006 letter was a referral response from the Office of the State Engineer regarding a separate application which sought to amend Elbert County's 1041 Regulations. The letter does not opine as to the adequacy of the water supply for Spring Valley Vistas (as set forth in RCI's Answer Brief at page 22, the Office of the State Engineer approved the adequacy of the water supply for Spring Valley Vistas by letter dated March 6, 2007). The Board was not bound to adopt any of the opinions of the Office of State Engineer set forth in the July 5, 2006 letter. Rather, the Board was empowered to weigh all of the competing evidence, considering all of the relevant facts and circumstances, and then make its decision. See *Sundance Hills*, 534 P.2d at 1216. This Court must affirm the Board's decision unless it finds no competent evidence in the record to support it. *Board of County Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). As set forth in detail in the Answer Briefs of Defendants, there is ample competent evidence in the record to support the Board's decision in this case. Therefore, the Board's decision should be affirmed.

WHEREFORE, Defendant Board of County Commissioners of the County of Elbert respectfully requests this Court accept this combined Motion and Sur-Reply Brief.

Respectfully submitted this 11th day of January, 2008.

REID AND SCHEFFEL, P.C.

/s/ Mark H. Scheffel

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In accordance with C.R.C.P. 121 § 1-26(9), a printed copy of this document with original signature(s) is maintained by Reid and Scheffel, P.C., and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of January, 2008, a true and correct copy of the foregoing DEFENDANT BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ELBERT'S MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF AND SUR-REPLY BRIEF has been served upon the following persons via LexisNexis File & Serve:

Jack Reutzal, Esq.
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Denver, Colorado 80203

/s/ Thomas J. Burke

In accordance with C.R.C.P. 121 § 1-26(9), a printed copy of this document with original signature(s) is maintained by Reid and Scheffel, P.C., and will be made available for inspection by other parties or the Court upon request.