

DISTRICT COURT, JEFFERSON COUNTY
COLORADO
100 Jefferson County Parkway
Golden, Colorado 80401

Plaintiff: LOOKOUT MOUNTAIN RESIDENTS UNITED, a Colorado nonprofit corporation; CODY PARK NEIGHBORHOOD ASSOCIATION, a Colorado nonprofit corporation; MARK ANDERSON; DEAN STAUFFER; SHELAGH STAUFFER; MICHAEL GLEASON; DOROTHY GLEASON; JOHN LANGE; DIANE LANGE; HAMILTON H. McDOWELL; BERNADETTE B. McDOWELL; RONALD STEPHEN JONES, Trustee of the Ronald Stephen Jones Trust; PATRICIA MARIE MICHEL; PAUL KALKWARF; BONNIE SAXTON; PETER N. LYNCH, III; NANCY L. LYNCH; MICHAEL PRATT; ANDREW MARTINEZ; TODD STORY; BRUCE KEITH; HERBERT YOUNG; SHARON YOUNG; CAROLE JEFFREY; KEVIN JEFFREY; ROBERT M. HEINE; ANNE R. HEINE; DENNIS LOCKE; and ANNE LOCKE

v.

Defendants: BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON; DONALD ROSIER, in his capacity as a Member of the Board of County Commissioners of Jefferson County; JOHN ODOM, in his capacity as a Member of the Board of County Commissioners of Jefferson County; and ACTIVATION MINISTRIES INTERNATIONAL

Attorneys for Defendants

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Case No. 2012-CV-I353

Division: 6 Ctrm.: 5B

THE BOARD OF COUNTY COMMISSIONERS' ANSWER TO FIRST CLAIM FOR RELIEF IN THE COMPLAINT

The Board of County Commissioners of the County of Jefferson, Colorado, (the "County"), submits this answer to the first claim for relief in the Complaint, as follows:

1. The County lacks information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Complaint, and therefore denies them.

2. The County admits the allegations in paragraph 2 of the Complaint.

3. The County admits that Donald Rosier and John Odom are members of the Board of County Commissioners of Jefferson County. The County lacks information sufficient to form a belief as to the truth of the remaining allegations in paragraph 3 of the Complaint, and therefore denies them.

4. The County admits the allegations in paragraph 4 of the Complaint.

5. The County admits that on or about June 16, 2011, Defendant Activation Ministries International ("AMI") submitted an application for approval of a special use on its property located at 166 South Lookout Mountain Road, Golden, Colorado (the "Subject Property"). The County admits that the Subject Property is located in the Suburban Residential Five (SR-5) Zone District in Jefferson County on Lookout Mountain. The County admits that, at the time of the application, the Subject Property was improved with 9,168 square foot church, which was a legal non-conforming use. The County admits that AMI purchased the Subject Property in 2008. The County admits that the application sought, among other things, approval of a special use permit to allow a maximum church building size of 46,000 square feet. The County denies the remaining allegations in paragraph 5 of the Complaint as vague and ambiguous.

6. The County admits the application was assigned the case number 11-110479SU (referred to in the Complaint as the "Special Use Case").

7. The County admits that Jefferson County Planning and Zoning staff submitted a response to AMI in the Special Use Case on or about July 22, 2011, and informed AMI that standards could not address the scale of the proposed building as it relates to the surrounding uses, that the size of the proposed building did not fit the community character of the area, and that a 46,000 square foot building was not compatible with the surrounding residential area. The County denies the remaining allegations in paragraph 7 of the Complaint as vague and ambiguous.

8. The County admits that, in November 2011, AMI revised the application in the Special Use Case, reducing the maximum allowed size of their building to 30,000 square feet from 46,000 square feet. The County denies the remaining allegations in paragraph 8 of the Complaint.

9. The County admits that, on November 28, 2011, Jefferson County Planning and Zoning staff responded to the modified application in the Special Use Case and advised AMI that the Planning and Zoning staff did not support the application because Special Use criteria related to visual and aesthetic impacts and community character could not be mitigated at the proposed size of the facility. The County denies the remaining allegations in paragraph 9 of the Complaint.

10. The County denies the allegations in paragraph 10 of the Complaint.

11. The County denies the allegations in paragraph 11 of the Complaint.

12. The County admits the allegations in paragraph 12 of the Complaint, except that the Planning Commission made its recommendation on February 8, 2012.

13. The County admits the allegations in paragraph 13 of the Complaint, except that the County denies that the record reflects that Foothills Fire Protection District was precluded from showing a video.

14. The County admits that, on March 13, 2012, the Board of County Commissioners took final action and adopted Resolution No. CC12-086, approving the Special Use Case, by the same 2 to 1 vote. The County denies that the approval did not include conditions or restrictions.

15. The County admits that, during the February 28, 2012, hearing, Commissioner Rosier stated that he had visited the church facility and driven through the community. The County admits that Commissioner Rosier indicated that one of the individuals who testified in support of the AMI application was his fourth grade teacher, and that in jest (and to much laughter) he made a comment to the effect that he would either have to recuse himself or pay attention. The County denies the remaining allegations in paragraph 15 of the Complaint.

16. The County lacks information sufficient to form a belief as to the truth of the allegations in paragraph 16 of the Complaint, and therefore denies them.

17. The County admits that, on March 12, 2012, in advance of the March 13, 2012, vote on Resolution No. CC12-086, a letter was received by the County requesting that Commissioners Rosier and Odom recuse themselves from voting on the Special Use Application. The County admits that it has never taken any formal action regarding the letter. The County admits that neither Commissioner Rosier nor Commissioner Odom disqualified themselves from the vote. The County admits that the letter is attached to the Complaint as Exhibit A. The County denies the remaining allegations in paragraph 17 of the Complaint.

18. In response to paragraph 18 of the Complaint, the County incorporates its responses to each of the allegations in the Complaint as set forth above.

19. The County admits the allegations in paragraph 19 of the Complaint.
20. The County denies the allegations in paragraph 20 of the Complaint.
21. In response to paragraph 22 of the Complaint, the County admits that C.R.C.P. 106 provides the only appropriate basis for a remedy for Plaintiffs. The County denies, however, that the Plaintiffs are entitled to any relief.
22. The County denies the allegations in paragraph 22 of the Complaint.
23. In response to paragraph 23 of the Complaint, the County admits that C.R.C.P. 106 provides a basis for review of the County's actions. The County denies, however, that the Plaintiffs are entitled to any relief.
24. The County does not answer paragraphs 24 through 33 of the Complaint at this time, and is instead filing a motion to dismiss.
25. The County denies each and every allegation of the Complaint except to the extent expressly addressed herein.

DEFENSES

First Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Defense

The County is entitled to judgment in its favor because the County did not abuse its discretion or exceed its jurisdiction.

Third Defense

The County is entitled to judgment in its favor because there is competent evidence in the record that supports its determination.

Fourth Defense

The County is entitled to judgment in its favor because the County complied with all applicable regulations and procedural requirements.

The County reserves the right to assert any additional defenses should factual bases become known at a later date.

Fifth Defense

Some of the Plaintiffs may lack standing.

County's Request for Relief

WHEREFORE, the County respectfully requests that this Court deny the Plaintiffs' claims, award the County its costs, and provide such further relief as the Court deems just and proper.

Dated this 30th day of April 2012.

JEFFERSON COUNTY ATTORNEY
ELLEN G. WAKEMAN, #12290

/s/ Eric T. Butler

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April 2012, the foregoing was filed via Lexis/Nexis File and Serve and served as follows:

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/s/ Teri Garrod

Teri Garrod, Paralegal

Pursuant to C.R.C.P. 121 § 1-26, the original of this document with the original signatures will be maintained in the office of the Jefferson County Attorney, 100 Jefferson County Parkway, Ste. 5500; Golden, Colorado 80419, and will be made available for inspection by other parties or the Court upon request.

DISTRICT COURT, JEFFERSON COUNTY
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Plaintiff: LOOKOUT MOUNTAIN RESIDENTS UNITED, a Colorado nonprofit corporation; CODY PARK NEIGHBORHOOD ASSOCIATION, a Colorado nonprofit corporation; MARK ANDERSON; DEAN STAUFFER; SHELAGH STAUFFER; MICHAEL GLEASON; DOROTHY GLEASON; JOHN LANGE; DIANE LANGE; HAMILTON H. McDOWELL; BERNADETTE B. McDOWELL; RONALD STEPHEN JONES, Trustee of the Ronald Stephen Jones Trust; PATRICIA MARIE MICHEL; PAUL KALKWARF; BONNIE SAXTON; PETER N. LYNCH, III; NANCY L. LYNCH; MICHAEL PRATT; ANDREW MARTINEZ; TODD STORY; BRUCE KEITH; HERBERT YOUNG; SHARON YOUNG; CAROLE JEFFREY; KEVIN JEFFREY; ROBERT M. HEINE; ANNE R. HEINE; DENNIS LOCKE; and ANNE LOCKE

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▼ COURT USE ONLY ▲

Case No. 2012-CV-1353

Division: 6 Ctrm.: 5B

MOTION TO DISMISS CERTAIN CLAIMS IN THE COMPLAINT

The Board of County Commissioners of the County of Jefferson (the “Board”), Donald Rosier, and John Odom respectfully submit this motion to dismiss certain claims against them in the Complaint.

Plaintiffs filed this case seeking C.R.C.P. 106(a)(4) review of the Board’s decision to approve the special use application of Activation Ministries International (“AMI”). In addition to Rule 106(a)(4) relief, Plaintiffs request C.R.C.P. 106(a)(2), or mandamus, relief and declaratory relief. Because Rule 106(a)(4) provides the exclusive basis for review of the Board’s decision, Plaintiffs’ claims for Rule 106(a)(2) relief and declaratory judgment should be dismissed. Additionally, because relief is only available against a quasi-judicial body, and not its individual members, the claims against Commissioners Rosier and Odom should be dismissed.

ALLEGED FACTS

The Complaint alleges the following facts. AMI sought special use approval that would allow expansion of its church, located on Lookout Mountain. See Complaint ¶ 5. At the hearing on AMI’s application, Commissioner Rosier stated that he had independently visited the area involved in the case, driven the roads in the area, and conducted his own independent investigation of the case and AMI property. Id. at ¶ 15. When one of Commissioner Rosier’s former teachers testified in support of the application, Commissioner Rosier made a comment to the effect that perhaps he would need to recuse himself from acting on the application. Id.

Immediately following the conclusion of the public hearing, Commissioner Odom

approached and got into a friendly, familiar and lengthy conversation with a witness who had testified at the hearing on behalf of AMI. Id. at ¶ 16. It appeared that this witness was a friend of Commissioner Odom and that Commissioner Odom had a very familiar relationship with this witness. Id. During the course of the conversation, one of the pastors for AMI interjected herself into the conversation and participated in the conversation. Id.

The Board voted 2 – 1 to approve AMI’s application, with Commissioners Rosier and Odom, neither of whom had recused themselves, voting in favor of the application. Id. at ¶ 13. In making the decision, the Board was acting in a quasi-judicial capacity. Id. at ¶ 19. The Board allegedly failed to comply with Colorado statutes governing the adoption of master plans, the Jefferson County Comprehensive Master Plan, the Central Mountains Community Plan and the Jefferson County Zoning Resolution in approving AMI’s application. Id. at ¶ 32.

STANDARD OF REVIEW

C.R.C.P. 12(b)(5) allows defendants to “test the formal sufficiency of the complaint.” Coors Brewing Co. v. Floyd, 978 P.2d 663, 665 (Colo. 1999), quoting Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996). The trial court must accept all allegations of material fact as true and view the allegations in the light most favorable to the plaintiff. Coors Brewing, supra at 665. A complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts that would entitle it to relief. Id.

“The court is not required to accept as true legal conclusions couched as factual allegations.” Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008). The complaint may be also dismissed if the substantive law does not support the claims asserted. Id.

ARGUMENT

A. C.R.C.P. 106(a)(4) Provides Plaintiffs' Sole Remedy.

Quasi-judicial determinations such as the one in this case are reviewed pursuant to C.R.C.P. 106(a)(4), which provides for review “[w]here 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.” Case law confirms that decisions regarding special use applications are reviewed pursuant to C.R.C.P. 106(a)(4). *See, e.g., Sheep Mountain Alliance v. Board of County Com'rs, Montrose County*, 271 P.3d 597, 601 (Colo. App. 2011).

Further, “[i]t is axiomatic” that C.R.C.P. 106(a)(4) provides the exclusive means of determining whether a government body exercising quasi-judicial functions has abused its discretion or exceeded the bounds of its jurisdiction. *Best v. La Plata Planning Com'n*, 701 P.2d 91, 94 (Colo. App. 1984).

1. A C.R.C.P. 106(a)(2) claim is not proper.

Although Plaintiffs properly bring their complaints regarding recusal pursuant to their Rule 106(a)(4) claim (see ¶ 22(j-k)), they also state them in a separate C.R.C.P. 106(a)(2) claim. This is both unnecessary and improper.

A judicial officer's refusal to recuse himself is properly reviewed pursuant to C.R.C.P. 106(a)(4). *Kane v. County Court Jefferson County*, 192 P.3d 443, 444 -445 (Colo. App. 2008) (citing with approval *Smith v. Beckman*, 683 P.2d 1214, 1215 (Colo. App.1984)). Rule 106(a)(2) relief, however, is only appropriate if there is no other available remedy. *Board of County Com'rs of the County of Archuleta v. County Road Users Ass'n*, 11 P.3d 432, 437 (Colo.

2000). Because Rule 106(a)(4) provides a basis for relief, the rule 106(a)(2) claim must be dismissed.

Not only does Rule 106(a)(4) provide an adequate remedy for allegations of improper failure to recuse, but Rule 106(a)(2) is not applicable to recusal decisions. Rule 106(a)(2) is intended for the limited purpose of compelling the performance of a nondiscretionary ministerial act. Sherman v. City of Colo. Springs Planning Com'n., 680 P.2d 1302, 1304 (Colo. App. 1983). A decision as to whether disqualify a quasi-administrative official is discretionary, rather than ministerial, and, like the decision of a judge, will not be disturbed absent an abuse of that discretion. See Rice v. Department of Corrections, 950 P.2d 676, 681 (Colo. App. 1997). Therefore, Rule 106(a)(2) is not a proper vehicle for challenging an abuse of such discretion.

2. *A declaratory judgment claim is not proper.*

As noted above, a judicial officer's refusal to recuse himself is properly reviewed pursuant to C.R.C.P. 106(a)(4). Kane, 192 P.3d at 444-445. C.R.C.P. 106(a)(4) provides the exclusive means of determining whether a government body exercising quasi-judicial functions has abused its discretion or exceeded the bounds of its jurisdiction. Best, 701 at 94. Therefore, Plaintiffs' complaints regarding failure to recuse should be addressed pursuant to their Rule 106(a)(4) claim, rather than a claim for declaratory relief.

Plaintiffs also request a declaration that that the Defendants failed to comply with statutes and regulations governing the special use process. Complaint, ¶ 32. However, C.R.C.P. 106(a)(4) is the exclusive remedy for the determination of whether the government body "properly applied state or local law." Best v. La Plata Planning Com'n., 701 P.2d 91, 94 (Colo. App. 1984) (regarding a zoning decision). See also Quaker Court Ltd. Liability Co. v. Board of

County Com'rs, 109 P.3d 1027, 1030 (Colo. App. 2004) (C.R.C.P. 106(a)(4) review available to determine “whether an erroneous legal standard was applied by the agency”).

C.R.C.P. 57 does provide for review in the limited circumstance when, in addition to challenging the quasi-judicial determination of a governmental body, the plaintiff challenges the overall validity of a statute or regulation. Quaker Court, 109 P.3d at 1031; Best, 701 P.2d at 94. No such claims have been made in this case, however. Therefore, Plaintiffs’ claims should be addressed within the context of their Rule 106(a)(4) claim.

B. Commissioners Rosier and Odom Are Not Proper Parties.

Plaintiffs named Commissioners Rosier and Odom as individual defendants. However, as described above, Rule 106(a)(4) is sufficient and is the only available remedy for review of the Board’s action on AMI’s special use application. Relief is not available against individual board members under Rule 106(a)(4) and, therefore, the claims against the commissioners must be dismissed.

“A proceeding brought pursuant to C.R.C.P. 106(a)(4) concerns whether an inferior tribunal has exceeded its jurisdiction or abused its discretion.” Dahman v. City of Lakewood, 44 Colo. App. 261, 262, 610 P.2d 1357, 1358 (1980) (rev’d on other grounds). In Dahman, the Court found that naming the individual membership of the city council that took action was insufficient, and that the city council itself was an indispensable party. Id. at 1358-59.

The granting of a special use is governed by and pursuant to the Board’s zoning powers. See Carron v. Board of County Com’rs, Ouray County, 976 P.2d 359, 362 (Colo. App. 1998). The Board has the authority to change zoning, not the individual elected membership, which changes over time. See C.R.S. 30-28-116 (“[T]he board of county commissioners may amend

the number shape, boundaries, or area of any district, or any regulation of or within such district, or any other provisions of the zoning resolution”). “A county exercises its power by and through its board of commissioners, not through individual members.” Nicholl v. E-470 Public Highway Authority, 896 P.2d 859, 866 (Colo. 1995) (citing C.R.S. § 30-11-103). Suits against a county must be brought against “The board of county commissioners of the county of” C.R.S. 30-11-105. “An action attempted to be brought under any other designation is a nullity, and no valid judgment can enter in such a case.” Calahan v. Jefferson County, 163 Colo. 212, 214, 429 P.2d 301, 302 (1967).

The Supreme Court has explained:

The function of a Rule 106(a)(4) proceeding is to review the action of an inferior tribunal which has allegedly exceeded its jurisdiction or abused its discretion. Since such a proceeding is properly brought against the inferior tribunal and the rule to show cause issues only against the tribunal, the relief may be granted, if at all, against the tribunal only.

Kornfeld v. Perl Mack Liquors, Inc., 193 Colo. 442, 443, 567 P.2d 383, 384 (Colo. 1977)

(emphasis added) (discussing misjoinder of interested party who testified at hearing). As the Kornfeld and Dahman decisions make clear, to the extent that Plaintiffs have any right to relief, such relief is against the Board, not its individual members. Commissioners Rosier and Odom are not proper party defendants to this Rule 106(a)(4) action and the claim against them should be dismissed pursuant to C.R.C.P. 12(b)(5).

CONCLUSION

For the reasons stated above, Plaintiffs’ Second Claim, for relief pursuant to C.R.C.P. 106(a)(2), and Third Claim, for declaratory relief, should be dismissed. Additionally, all claims against Commissioner Donald Rosier and Commissioner John Odom should be dismissed.

C.R.C.P. 106(a)(4) review provides an adequate means of review of the issues raised by Plaintiffs.

Dated this 30th day of April, 2012.

JEFFERSON COUNTY ATTORNEY
ELLEN G. WAKEMAN, #12290

/s/ Eric T. Butler

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April 2012, the foregoing was filed via Lexis/Nexis File and Serve and served as follows:

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 Via: Lexis/Nexis
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/s/ Teri Garrod

Teri Garrod, Paralegal

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