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	▼ **COURT USE ONLY** ▲ Case No. 2012-CV-1353 Division: 6 Ctrm.: 5B
Attorneys for Defendants JEFFERSON COUNTY ATTORNEY ELLEN G. WAKEMAN, #12290 Eric T. Butler, #29997 Assistant County Attorney Jefferson County Attorney's Office 100 Jefferson County Parkway, #5500 Golden, CO 80419-5500 Phone: 303-271-8916 Fax: (303) 271-8901 Email: ebutler@co.jefferson.co.us	

REPLY IN SUPPORT OF 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 (collectively, the "County") respectfully submit this reply in support of their motion to dismiss certain claims against them in the Complaint.

Much of the Plaintiffs' Response is devoted to arguments regarding why Commissioners Rosier and Odom should allegedly have recused themselves. Such arguments are premature. The questions before the Court are whether C.R.C.P. 106(a)(2) and C.R.C.P. 57 claims are necessary to obtain such review, and whether the individual commissioners are appropriate parties to this action. As discussed in the County's Motion and below, a Rule 106(a)(4) claim against the Board is sufficient to provide for effective review of Plaintiffs' allegations.

ARGUMENT

A. A C.R.C.P. 106(a)(2) Claim Is Not Proper.

In response to the motion to dismiss, Plaintiffs present lengthy legal briefing on the recusal obligations of administrative officials in quasi-judicial proceedings. These arguments are premature. The County's motion to dismiss Plaintiffs' C.R.C.P. 106(a)(2) claim did not argue that the Complaint fails to allege sufficient facts to place the matter of recusal before the Court. Rather, the County's motion is based on the principle that the recusal issue should be addressed via Plaintiffs' Rule 106(a)(4) claim against the Board.

In response to this argument, Plaintiffs cite City of Trinidad v. District Court in and for Las Animas County, 196 Colo. 106, 581 P.2d 304 (Colo. 1978). That case held that a district court judge's failure to rule on a properly filed motion to disqualify pursuant to C.R.C.P. 97 was reviewable by the Supreme Court in an original proceeding pursuant to C.R.C.P. 106(a)(2). City of Trinidad is distinguishable for several reasons.

First, apparently no party to that case raised the argument that Rule 106(a)(4) relief might be available. As more recent case law has held, a judicial officer's refusal to recuse himself is properly reviewed pursuant to C.R.C.P. 106(a)(4). See Kane v. County Court Jefferson County, 192 P.3d 443, 444 -445 (Colo. App. 2008). And as the Supreme Court has ruled subsequent to the City of Trinidad case, Rule 106(a)(2) relief 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). Specifically, "if certiorari review under C.R.C.P. 106(a)(4) is available, a mandamus action would not be appropriate." Sherman v. City of Colorado Springs Planning Com'n, 763 P.2d 292, 295 (Colo. 1988). Because Rule 106(a)(4) provides a basis for relief, Rule 106(a)(2) relief is unavailable. On this basis alone, the Court should dismiss Plaintiffs' C.R.C.P. 106(a)(2) claim.

Second, in order to have a remedy under C.R.C.P. 106(a)(2), the plaintiff must have a clear right to the relief sought and the defendant has a clear duty to perform the act requested. County Road Users Ass'n, 11 P.3d at 437. Such a duty to act must be administrative and purely ministerial in nature. Archibold v. Public Utilities Com'n of State of Colorado, 58 P.3d 1031, 1039 (Colo. 2002). Unlike the judge in Trinidad, neither the Board nor individual commissioners failed to exercise any clear ministerial duty. The district court judge in City of Trinidad failed to act on a motion pursuant to C.R.C.P. 97 that was filed prior to entry of a default. Rule 97 provides, "Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon." The law clearly required the judge to act. The Board's proceedings, however, are not subject to Rule 97. See C.R.C.P. 1. Plaintiffs have not pointed to any rule or regulation of the Board that would require the Board to act on

their letter, or even allow a motion to disqualify to be made by a letter delivered to the offices of the Board after a hearing. Although Venard v. Department of Corrections, 72 P.3d 446 (Colo. App. 2003), cited by Plaintiffs, refers to Rule 97, that matter was a State Personnel Board hearing, and therefore generally subject to the Rules of Civil Procedure. See Weiss v. Department of Public Safety, Colorado State Patrol, 847 P.2d 197, 199 (Colo. App. 1992), citing § 24–4–105(7), C.R.S (1988 Repl. Vol. 10A). The letter submitted to the Board, however, was just a letter, and had no legal effect. Although the Plaintiffs may argue that failure to recuse based on the matters discussed in that letter was an abuse of discretion, the Board and its commissioners had no clear ministerial duty to act in response to receipt of the letter.

Finally, even if Rule 97 applied to the Board, and the letter in question constituted a motion pursuant to that rule, the letter came after the Board's decision to approve the application was made. The Board voted on the application in question and approved it on February 28, 2012. Complaint, ¶ 13. There is no allegation that any Board member was asked to disqualify himself prior to that vote. On March 12, 2012, well after the oral vote on approval of the application, a letter was delivered to the offices of the Board complaining that Commissioners Rosier and Odom should recuse themselves. Complaint, ¶ 13, and Exhibit A to the Complaint. There could not be any nondiscretionary, ministerial duty to stop the proceedings prior to the vote approving the application because nothing resembling a motion to disqualify had been presented to the Board or its members at that time.

For the reasons stated above, the Court should dismiss Plaintiffs' C.R.C.P. 106(a)(2) claim and address the recusal issues in the context of the Rule 106(a)(4) claim.

B. A Declaratory Judgment Claim Is Not Proper.

In response to the County's arguments that C.R.C.P. 106(a)(4), rather than a declaratory judgment claim, provides the proper means to review allegations of failure of Board members to disqualify themselves, Plaintiffs present more argument that Commissioners Rosier and Odom should have recused themselves. Again, this merits argument is premature and not responsive to the County's motion.

The issue is whether a declaratory judgment claim is the proper vehicle for review of Plaintiffs' allegations. 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 v. La Plata Planning Com'n, 701 P.2d 91, 94 (Colo. App. 1984). 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.

In their response, Plaintiffs argue that, at least to some extent, their claim falls within an exception allowing C.R.C.P. 57 review in the limited circumstance when a plaintiff challenges the overall validity of a statute or regulation. Quaker Court Ltd. Liability Co. v. Board of County Com'rs, 109 P.3d 1027, 1030 (Colo. App. 2004). Plaintiffs claim that they have challenged the validity of the criteria for determining special use cases set forth in the Jefferson County Zoning Resolution. However, while Plaintiffs may now, in hindsight, desire to challenge the validity of those criteria, a careful review of the Complaint does not reveal any allegations that would support it.

The Complaint alleges that the actions of the Board in approving the application were "*ultra vires* and void based upon the failure to comply with Colorado statutes governing the adoption of master plans, the Jefferson County Comprehensive Master Plan, the Central Mountains Community Land and the Jefferson County Zoning Resolution." Complaint ¶ 32. Nowhere, however, does the Complaint allege that the special use criteria set forth in the Zoning Resolution are invalid. The Complaint provides no notice of any argument that any regulation is invalid.

For the above reasons, Plaintiffs' declaratory judgment claim must be dismissed.

C. Commissioners Rosier and Odom Are Not Proper Parties.

Plaintiffs' argument that Commissioners Rosier and Odom are proper parties hinges on their arguments that C.R.C.P. 57 and/or 106(a)(2) relief are necessary and/or proper to award them relief, and that their relief should be in the form of a directive to those individual Board members. That is neither necessary nor appropriate.

As described above, Rule 106(a)(4) is sufficient and is the only available remedy for review of the Board's action on the special use application. Relief is not available against individual board members under Rule 106(a)(4), but instead "concerns whether an inferior tribunal has exceeded its jurisdiction or abused its discretion." See Dahman v. City of Lakewood, 44 Colo. App. 261, 262, 610 P.2d 1357, 1358 (1980) (rev'd on other grounds).

If the Court finds that either of the Commissioners improperly failed to recuse himself in this case, and that such failure invalidates the Board action, the appropriate remedy is to find that the Board abused its discretion and vacate the approval of the application. That is a sufficient remedy for the Plaintiffs, and can be accomplished by a Rule 106(a)(4) claim.

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, the County respectfully requests that the Court grant its motion to partially dismiss.

Dated this 25th day of May 2012.

JEFFERSON COUNTY ATTORNEY
ELLEN G. WAKEMAN, #12290

/s/ Eric T. Butler
By: _____
Eric T. Butler, #29997
Assistant County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May 2012, the foregoing was filed via Lexis/Nexis File and Serve and served as follows:

Scott D. Albertson, Esq.
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Golden, CO 80401

___ U. S. Mail, postage prepaid
_X_ Via: Lexis/Nexis
___ Email:
___ Fax: 303-271-2860

/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.