COLORADO COURT OF APPEALS

DATE FILED: November 29, 2018
CASE NUMBER: 2017CA1973

Court of Appeals No. 17CA1973
Eagle County District Court Nos. 16CV30361 & 16CV30363
Honorable Paul R. Dunkelman, Judge

Barbara Benson; Jack Benson; Craig Foley; Greg Johnson; and Cordillera Property Owners Association, Inc.,

Plaintiffs-Appellants,

v.

Eagle County, Colorado, acting by and through the Board of County Commissioners of Eagle County,

Defendant-Appellee,

and

Behringer Harvard Cordillera, LLC,

Intervenor-Appellee.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE MÁRQUEZ*
Furman and Dunn, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 29, 2018

Boyle/Apelman P.C., Terence P. Boyle, Mark Apelman, Denver, Colorado; Dean Neurwith P.C., Dean S. Neurwith, Denver, Colorado; Thomas B. Wilner, Washington, D.C., for Plaintiffs-Appellants Barbara Benson, Jack Benson, Craig Foley, and Greg Johnson

Johnson & Repucci LLP, Lew M. Harstead, Michael S. Davidson, Boulder, Colorado, for Plaintiff-Appellant Cordillera Property Owners Association, Inc.

Bryan R. Treu, County Attorney, Beth A. Oliver, Assistant County Attorney, Eagle, Colorado, for Defendant-Appellee

Sarah J. Baker P.C., Sarah J. Baker, Eagle, Colorado; Pryor & Bruce, Bobby Pryor, Dana Bruce, Rockwall, Texas, for Intervenor-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 In this C.R.C.P. 106(a) action, plaintiffs, homeowners Barbara and Jack Benson, Craig Foley, and Greg Johnson (the Homeowners), and the Cordillera Property Owners Association, Inc. (CPOA), separately appeal from a district court judgment affirming the decision of the Eagle County Board of County Commissioners (Board) and the court's orders dismissing the homeowners' claim for declaratory judgment and the CPOA's motion to add a claim for declaratory relief pursuant to C.R.C.P. 57. We affirm.

¶ 2 Cordillera is a high-end luxury community near Vail that is governed by a "Cordillera Planned Unit Development Control Document" (PUD). The PUD mandates the type of development that can occur in Cordillera, regulatory requirements and processes, and zoning rules.

¶ 3 Cordillera consists of residential homes, a "Lodge Parcel," and a "Village Center Parcel." This appeal stems from a dispute over the Board's interpretation of the Cordillera 2009 PUD Amendment concluding that the Lodge Parcel can be converted into an outpatient drug rehabilitation facility. The Homeowners and the CPOA separately appealed the Board's decision to the district court. The Homeowners brought a claim for declaratory relief under

C.R.C.P. 57, and both the Homeowners and the CPOA alleged that the Board abused its discretion under C.R.C.P. 106(a)(4). The CPOA also sought to amend its complaint and bring a C.R.C.P. 57 claim for declaratory relief based on new evidence. The district court dismissed the Homeowners' C.R.C.P. 57 claim as inappropriate and untimely, rejected the CPOA's request to amend, and affirmed the Board's decision under C.R.C.P. 106(a)(4).

I. Background

¶ 4 The Lodge Parcel contains a 68,736-square-foot facility that was constructed in 1988 (the Lodge's clubhouse) and a carriage house that was erected in 1989. The Lodge's clubhouse includes fifty-six rooms and a spa, and the Lodge Parcel historically included a restaurant, a golf course, and tennis courts that were available to Cordillera property owners at discounted rates via annual membership fees. The Village Center Parcel consists of open space, tennis courts, and hiking paths.

¶ 5 In 1993 Cordillera adopted the "Declaration of Covenants, Conditions, and Restrictions" (Declaration), which provides, as relevant here, that "Private Amenities" include "without limitation, the lodge and the golf course." It also states as follows:

> Private Amenities: Access to and use of the Private Amenities is strictly subject to the rules and procedures of the respective Owners of the Private Amenities, and no Person gains any right to enter or to use those facilities by virtue of membership in the Association or ownership or occupancy of a unit. . . .
>
> Rights to use the Private Amenities will be granted only to such persons, and on such terms and conditions, as may be determined by their respective owners. Such owners shall have the right, from time to time in their sole and absolute discretion and without notice, to amend or waive the terms and conditions of use of their respective Private Amenities and to terminate use rights altogether.

¶ 6 The Cordillera PUD was first drafted in 1987, and it was amended multiple times throughout the years, including the tenth amendment in 2003 (2003 PUD Amendment) and the eleventh amendment in 2009 (2009 PUD Amendment).

¶ 7 Behringer Harvard, through his company Behringer Harvard Cordillera, LLC (BHC), purchased the Lodge and Village Center Parcels in 2007. The undisputed evidence reflects that over the next two years, the Lodge suffered substantial net operating losses. In 2009, only fifty-three Cordillera residents held memberships at the Lodge, and the Lodge's hotel occupancy was at approximately fifty percent.

A. 2003 PUD Amendment

¶ 8 As relevant to this appeal, the 2003 PUD Amendment, with respect to the Lodge Parcel, stated as follows:

> Section 2.01.1: Allowed Uses.
> i. Clubhouse and Lodge building or buildings with related facilities including but not limited to the following:
> a. Both indoor and outdoor athletic facilities such as racquet ball courts, tennis courts, swimming pools, exercise rooms, weight lifting rooms, game rooms or other similar uses and facilities.
> b. Restaurant and bar.
> c. Meeting rooms.
> d. Lounge or sitting rooms.
> e. Offices for administration of subdivision, lodge and club facility.
> f. Lodge and conference facility including 20 lodge suites, food service facilities, laundry and cleaning facilities, reception desk and lobby along with related facilities.
> g. Two non-salable employee dwellings.
> h. Parking areas.
> i. Storage and maintenance structures for equipment and vehicles used for roads, lawns, gardens, buildings, and utilities.

The provision governing the Village Center Parcel stated as follows:

> Section 3.01.2: Permitted Uses. The following uses are permitted within the Village Center of Planning Parcel A:
> 1. Retail Commercial.
> 2. Service Commercial, including retail establishments.
> 3. Recreational Commercial.

4. Professional Offices.
5. Temporary Offices.
6. Lodging and Accommodations.
7. Community Recreational Facilities.
8. Amphitheater/Concerts/Performances.
9. Special Community Events.
10. Residential – Single Family.
11. Residential – Townhome.
12. Residential – Multi-Family.
13. Employee Housing.
14. Educational Facilities.
15. Community Information Center.
16. Parking Structures.
17. Day Care Facility.
18. Utility Facilities.
19. Community Safety, Service, Maintenance and Administrative Facilities.
20. Spa Facilities.
21. Accessory Buildings and Uses.

¶ 9 The Eagle County Land Use Regulations define "Office" to include "a professional office occupied by those such as physicians and other health care professionals, dentists, lawyers, architects, engineers, accountants and other professionals." Eagle Cty. Land Use Regs. ch. 2, § 2-110.

B. 2009 PUD Amendment

¶ 10 In an effort to make the Lodge more profitable, BHC sought to amend the Cordillera PUD in 2009. In a letter explaining its plan, BHC wrote that the 2009 PUD Amendment "is intended to address certain 'clean-up' items in the Existing PUD." It also stated that it

"does not introduce new or additional density or uses to the Existing PUD, or otherwise substantively change the Existing PUD." It stated it would be fixing errors, replacing inaccurate maps, and adding "updates to reflect the current status of development approvals for the Lodge Parcel and the Village Center Parcel, and clarification of the treatment of the Lodge Parcel and the Village Center Parcel as a single planning parcel." It also specified that density would be transferrable between the Lodge and Village Center Parcels and that "the permitted uses are the same for the Lodge Parcel and Village Center Parcel."

¶ 11 BHC proposed a change to section 2.01.1 that would alter the allowed uses of the Lodge Parcel from the 2003 PUD Amendment's "i. Clubhouse and Lodge building or buildings with related facilities *including but not limited to the following*" (emphasis added), to state that the Lodge Parcel could have "1. Clubhouse and Lodge building or buildings with related facilities" along with thirty-three other uses, separately numbered one through thirty-four. The proposed change thus eliminated the "including but not limited to the following" language from the clubhouse and lodge use, and changed the numbering system so that instead of the permitted uses being

subsections of the clubhouse and lodge, the thirty-four permitted uses — including the Lodge — were separate.

¶ 12 As relevant here, one of the uses BHC proposed to add was for "Medical Offices/Facility" that was not expressly included in the 2003 PUD Amendment, though it included professional offices in permitted uses of the Village Center Parcel. Because this was a major modification to the Cordillera PUD, BHC sought approval from the CPOA. After meeting with BHC, the CPOA proposed one modification to the proposed amendment in section 2.01.1: the CPOA rewrote the provision relating to medical office/facility use to read that it would be "limited to clinic and outpatient facilities for non-critical care, including, without limitation, outpatient plastic surgery and other cosmetic procedures." Otherwise, the CPOA found the amendment acceptable and in the best interest of the community, and the CPOA and Cordillera Metropolitan District (CMD) signed off on the amendment.

¶ 13 BHC submitted its application to the Board. Each resident was mailed a notice of the proposed amendment, a notice was posted in the local newspaper, and a formal hearing was held before the Board. The Board approved the 2009 PUD Amendment.

C. 2016 Sale and Interpretation

¶ 14 In 2013, BHC put the Lodge and Village Center Parcels on the market for sale. The only serious offer came approximately thirty months later from Concerted Care Group (CCG). In early 2016, CCG entered into a contract to purchase the Lodge and Village Center Parcels from BHC. It announced its plan to use the Lodge for a clinic for non-critical, inpatient treatment of numerous addictive conditions, included eating disorders, alcoholism, chemical dependency, and behavioral health conditions. It also planned to operate a residential rehabilitation facility with fitness centers, yoga studios, nutritional facilities, and recreational facilities. CCG stated it considered updating tennis courts for the Cordillera residents' use and making certain facilities on the Village Center Parcel available to the community.

¶ 15 Prior to closing on the Parcels, CCG sought to obtain a formal County interpretation seeking approval of its proposed use. In the spring of 2016, BHC and CCG met with County staff to discuss the interpretation and proposed uses. On July 11, 2016, Robert Narracci, the Director of Community Planning for Eagle County

(Director) re-issued[1] a letter interpreting the 2009 PUD Amendment. He concluded that section 2.01.1 of the Cordillera PUD allowed an inpatient clinic for medical addiction treatment with an accompanying residential rehabilitation facility on the Lodge Parcel. Thus, he approved of CCG's proposed use as a use-by-right under the Cordillera PUD.

D. Procedural History

¶ 16 The CPOA and the CMD appealed the Director's interpretation to the Board. The Board held a hearing on September 20, 2016, after notice and public comment, during which it heard from the CPOA, BHC, CCG, and the public. At the end of the hearing, the Board orally affirmed the Director's interpretation with modification, concluding that inpatient uses are not allowed under the Cordillera PUD, but that CCG's proposed use was acceptable as an outpatient clinic with a separate residential rehabilitation facility. It also concluded that the Lodge owner could eliminate and replace the

[1] The Director's interpretation was originally issued in response to a request by CCG on June 1, 2016. Because CCG was not a property owner in Cordillera at the time, the CPOA and CMD appealed, stating CCG had no standing to request an interpretation. In response to a request from BHC identical to CCG's request, the Director re-issued an identical interpretation on July 11, 2016.

community clubhouse with one of thirty-three other standalone non-Lodge uses listed in section 2.01.1 of the 2009 PUD Amendment. The Board issued its formal interpretation on October 11, 2016.

¶ 17 In November 2016, the Homeowners and the CPOA and CMD separately appealed the Board's decision to the district court. BHC intervened in the matter, and the district court consolidated the cases. In their first amended complaint, Homeowners asserted a claim under C.R.C.P. 106(a)(4) and C.R.C.P. 57. The CPOA and CMD brought a claim only under C.R.C.P. 106(a)(4). The Board and BHC filed motions to dismiss, and the district court granted the motions in part, leaving only the C.R.C.P. 106(a)(4) claims. The CPOA moved to amend its complaint in August 2017, to add a claim for declaratory relief under C.R.C.P. 57, based on alleged new evidence. The court denied that motion. The district court affirmed the Board's interpretation of the Cordillera PUD under C.R.C.P. 106(a)(4).

¶ 18 As noted, the Homeowners appeal the district court's order dismissing their C.R.C.P. 57 claim for declaratory relief and the

judgment affirming the Board's interpretation. The CPOA[2] appeals the court's judgment affirming the Board's interpretation and the order denying its motion to amend.

II. C.R.C.P. 106(a)(4)

¶ 19 The plaintiffs first challenge the Board's interpretation under C.R.C.P. 106(a)(4). The CPOA contends that the Board erred in approving CCG's use because CCG will be operating an inpatient facility, not an outpatient facility — contrary to the conclusions of the Board — and the 2009 PUD Amendment does not allow inpatient facilities on the Lodge Parcel. Additionally, both the Homeowners and the CPOA contend that the Board failed to consider the notice of the 2009 PUD Amendment, and it failed to consider the purpose of the 2009 PUD Amendment. We are not persuaded by these contentions.

A. Standard of Review

¶ 20 C.R.C.P. 106(a)(4) provides for judicial review of a decision of any governmental body or any lower judicial body exercising judicial or quasi-judicial functions to determine whether the body exceeded

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[2] CMD is not a party on appeal.

its jurisdiction or abused its discretion. *Bd. of Cty. Comm'rs v. O'Dell*, 920 P.2d 48, 49 (Colo. 1996); *Rangeview, LLC v. City of Aurora*, 2016 COA 108, ¶ 15. The district court has no factfinding authority in such cases, and our review is the same as that exercised by the district court. *Rangeview*, ¶ 15; *Canyon Area Residents for the Env't v. Bd. of Cty. Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006). We review the decision of the governmental body itself, not the district court's decision regarding the governmental body's decision. *O'Dell*, 920 P.2d at 50. Our review is limited to whether the Board exceeded its authority or abused its discretion. *Rangeview*, ¶ 15; *Canyon Area Residents*, 172 P.3d at 907.

¶ 21 We examine whether the Board applied the correct legal standards and whether competent evidence supports its exercise of discretion. *Nixon v. City & Cty. of Denver*, 2014 COA 172, ¶ 11. We must uphold the Board's decision unless there is no competent evidence in the record to support it. *Carney v. Civil Serv. Comm'n*, 30 P.3d 861, 863 (Colo. App. 2001). "No competent evidence" means that the Board's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* (quoting *O'Dell*, 920 P.2d at 50); *accord Turney v.*

Civil Serv. Comm'n, 222 P.3d 343, 347 (Colo. App. 2009). "An action by an administrative [body] is not arbitrary or an abuse of discretion when the reasonableness of the [body's] action is open to a fair difference of opinion, or when there is room for more than one opinion." *Khelik v. City & Cty. of Denver*, 2016 COA 55, ¶ 13.

B. Additional Background

¶ 22 At the September 20, 2016, hearing, the Board reviewed the Director's submissions, listened to a presentation from the CPOA and CMD and a presentation from BHC and CCG, reviewed submittals from the public, and listened to over four and a half hours of testimony. The Board considered the following evidence related to CCG's proposed use:

- Section 2.01.1 of the 2009 PUD Amendment states that "Permitted Uses" of the Lodge Parcel include "Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, without limitation, outpatient plastic surgery and other cosmetic procedures" and residential uses — "Single-family," "Townhome," "Multi-family," and "Condominium and/or fractional interest ownership" — as five of thirty-four

standalone uses, only one of which is the clubhouse and lodge building.

- The Director's interpretation letter states that the "use proposed for the Lodge Parcel and lodge building itself, is a clinic including inpatient, non-critical care, for treatment of a variety of conditions . . . ."
- The Director testified at the hearing that "CCG presented its intent to operate as a residential treatment facility with a clinic component" and "the clinic itself could functionally be operated as an outpatient facility with patients staying in the rooms and receiving limited residential treatment."
- The Director stated that in his mind, the clinic plus the multifamily residential use equaled inpatient use.
- The CPOA submitted affidavits from two doctors alleging that CCG's proposed use was for a hospital or psychiatric hospital that provides inpatient care, which did not qualify as a clinic.
- The CPOA presented evidence that individuals in rehabilitation treatment centers often encounter

life-threatening symptoms during withdrawal, which would require critical care.

- CCG's medical director told the Board that they would not provide critical care.
- CCG's president and CEO told the Board that there would be a defined residential area and a defined clinical area. He also stated that the clinic would include examination rooms, doctors' offices, administrative offices, storage, group counseling rooms, and individual counseling rooms, and the residential side would include rooms identical to hotel rooms as well as condominium units.
- CCG's president and CEO told the Board that the clinic would operate from 9 a.m. to 5 p.m., that medical staff would be involved in the initial consultation before referring clients to addiction staff, and that there would be no treatment in the residential units or rooms.
- CCG's president and CEO stated that CCG was seeking clinically managed certification under the American

Society of Addiction Medicine criteria, rather than medically managed certification.

¶ 23 Additionally, the Board heard evidence related to the purpose of the PUD, the Lodge, and whether the Lodge must be available to Cordillera residents, including the following:

- The PUD provision pertaining to the Lodge Parcel does not contain an intent statement or preamble, but the provision regarding the Village Center Parcel includes an intent statement that it provides "a focal point to the community both within a physical design context and as a social gathering place."
- The Cordillera Declaration defines the Lodge as a Private Amenity, and it specifically states that access to private amenities can be changed or cancelled at any time and subject to rules and procedures of the Lodge's owner.
- Property owners submitted affidavits asserting that access to the Lodge's clubhouse was an important factor in their decision to buy property in Cordillera.
- Marketing documents related to Cordillera included statements that the Lodge is the "crowning jewel" and

"community centerpiece" of Cordillera, that the Lodge and Spa is an amenity, that "the Lodge at Cordillera is the centerpiece of a 3,100-acre master planned community," and that it is a "retreat for residents and guests."

C. Analysis

¶ 24 We affirm the Board's decision for the following reasons: (1) plaintiffs' argument that the Board erred in failing to consider the notice of the 2009 PUD Amendment was not raised to the Board, and we therefore decline to address its impact on the Board's interpretation; (2) the Board properly considered the purpose of the PUD, the Declaration, and the Lodge in making its determination; and (3) there was competent evidence in the record to support the Board's conclusion that CCG's proposed use qualified as a use-by-right under section 2.01.1 of the Cordillera PUD.

1. Notice Need Not be Considered

¶ 25 The Homeowners did not appear before the Board, and the CPOA did not argue to the Board that the notice of the 2009 PUD Amendment was insufficient to inform it that community access to the Lodge's clubhouse could be removed, nor did it make the notice

itself part of the record before the Board. *See* C.R.C.P. 106(a)(4)(I) (our review is "based on the evidence in the record"); *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008) (explaining that our review "is based solely on the record that was before the [governmental body]" (quoting *City & Cty. of Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo. App. 2002))).

2. The Board Considered the Purpose of the Cordillera PUD

¶ 26 The Eagle County Regulations require that the Board consider the "purposes for which the regulation was initially adopted." Eagle Cty. Regs. ch. 2, § 5-220.B.1. Plaintiffs contend that the Board failed to consider the purpose of the 2009 PUD Amendment in issuing its decision. The CPOA alleges that the purpose was "not to substantively change the [2003] PUD" and that by allowing the Lodge's clubhouse to be replaced with thirty-three standalone uses, it substantially changed the PUD in an unintended way. We reject these arguments.

¶ 27 First, there is substantial evidence in the record that the Board considered the purpose of the 2009 PUD Amendment, and it was a core issue that the Board had to resolve. The record contained discussion of the 2003 PUD Amendment and the changes

that occurred when it was amended in 2009; the Board reviewed affidavits from members of the CPOA in 2009 regarding their understanding of the 2009 PUD Amendment; it heard testimony regarding the reason for the 2009 PUD Amendment from BHC; it considered the CPOA's involvement in editing the 2009 PUD Amendment; and it examined the history of the Lodge and Cordillera's covenants. The Board ultimately concluded that the 2009 PUD Amendment was drafted, in part, to allow the Lodge's clubhouse to be replaced by one of thirty-three standalone uses, and was drafted in response to BHC's need to make the Lodge profitable.

¶ 28 Second, the plain language of the 2009 PUD Amendment, along with the discussion between BHC and the CPOA, which the Board considered, made it clear that the 2009 PUD Amendment was intended to change the uses of the Lodge Parcel. The 2009 PUD Amendment removed the "including but not limited to" language requiring uses on the Lodge Parcel to be ancillary to the Lodge's clubhouse. Instead, it was changed to:

> Section 2.01.1 Permitted Uses . . .

> 1. Clubhouse and Lodge building or buildings with related facilities.
>
> . . . .
>
> 14. Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures.

Although there was evidence in the record that the CPOA did not believe the language as drafted would allow the Lodge to be cut off from use by Cordillera residents, there was competent evidence in the record that the 2009 PUD Amendment clearly did so, and we will not substitute our judgment or reweigh the evidence when the Board's decision is supported by the record. *See O'Dell*, 920 P.2d at 50 ("In the case of a zoning proceeding, a court is not the fact finder and may not substitute its own judgment for that of a zoning board where competent evidence exists to support the zoning board's findings.").

¶ 29 Third, the CPOA's argument that the purpose of the 2009 PUD Amendment was clean-up only and was never meant to substantively change the PUD is unsupported given the procedures followed in its amendment. The PUD outlines specific procedures for major modifications to the PUD, all of which were completed for

the 2009 PUD Amendment: BHC requested and received approval from the CPOA, and the Board provided notice via newspaper and mailings, held a hearing, and approved the amendment. By following these steps, it is clear that the 2009 PUD Amendment was intended to alter the PUD, and when considered with the plain language of the 2009 PUD Amendment, it clearly meant to allow BHC to eliminate historical Lodge uses.

¶ 30 Finally, since at least 1993, when the Declaration was adopted, Cordillera residents' use of the Lodge was limited and could have been entirely eliminated by the owners. Although the Lodge was a selling point for residents, the Declaration clearly stated that community access to the Lodge's clubhouse was not guaranteed and was subject to conditions for use — including being eliminated altogether. Further, the 2003 PUD Amendment and the 2009 PUD Amendment contained language that the Village Center Parcel was to be the focal point for the community, but neither ever specifically designated the Lodge Parcel as a focal point or a social gathering place.

¶ 31 Thus, the Board properly considered the purpose of the 2009 PUD Amendment and determined that it was intended to allow the

Lodge's clubhouse to be replaced with any of thirty-three potential uses.

3. CCG's Proposed Use is a Use-By-Right under the Cordillera PUD

¶ 32 The Board concluded that CCG's proposed use was an allowed outpatient treatment facility with a separate residential component under the PUD. The CPOA nevertheless contends that the Board abused its discretion when it concluded that CCG's proposed use was allowed under the PUD because CCG intends to operate an inpatient facility and all the evidence supports this intention. Defendant responds that the Board did not abuse its discretion when it concluded that two separate uses are allowed on the Lodge Parcel and that there was competent evidence in the record to support its conclusion. We discern no abuse of discretion in the Board's decision approving CCG's use.

¶ 33 Initially, there is nothing in the record to support a conclusion that the Lodge could not have multiple uses. During the hearing on September 20, 2016, before the Board, the CPOA argued that as long as some part of the Lodge remained a community amenity, there was no reason one of the other thirty-three uses could not

also occur at the Lodge. For instance, the CPOA argued that there would be no problem with some units at the Lodge being converted to fractional-interest condominiums so long as there would be "some component of the resort community that remains as part of the resort for the benefit of the greater Cordillera community." The CPOA is correct that nothing in the 2009 PUD Amendment prevents the Lodge Parcel from having multiple uses. However, given the plain language of the 2009 PUD Amendment, the idea that one of the uses must involve community access is unsupported. *See supra* Part II.C.2.

¶ 34 We also conclude that the Board's determination that the 2009 PUD Amendment allows only clinical, outpatient, non-critical care is supported by the record. Before the Board, the Director and CCG argued that the 2009 PUD Amendment allows inpatient care because, if clinic meant only outpatient care, then "medical offices/facilities limited to clinic and outpatient facilities" would effectively be read as limited to "outpatient and outpatient facilities." Whatever merit this argument might have, as we noted above the CPOA argued that it should be limited to an outpatient facility, and we conclude that the Board was entitled to limit the

2009 PUD Amendment to outpatient care only, and discern no error in its conclusion. *See Lieb v. Trimble*, 183 P.3d 702, 704 (Colo. App. 2008) ("In a C.R.C.P. 106(a)(4) review, an agency's legal conclusions are not reviewed de novo, and will be affirmed if supported by a reasonable basis.").

¶ 35 Finally, we discern no error in the Board's determination that CCG's proposed use qualified as a use-by-right under the 2009 PUD Amendment. The Board received competent evidence that the clinic use would be separate from the residential use, despite evidence that the uses would be intertwined. There was evidence that the clinic would operate from 9 a.m. to 5 p.m., that no treatment would occur in the residential units, and that the clinic would be physically separate from the residential units.

¶ 36 The CPOA states that despite this evidence, it is "axiomatic that a medical use that requires an overnight stay at The Lodge for the period of treatment constitutes an inpatient use" because the use "mandates that one must stay at the Lodge in order to receive treatment as a patient and one must receive treatment as a patient in order to stay at The Lodge as a resident." However, because it is clear that there was evidence of two distinct areas with different

uses, both of which are separately allowed in the 2009 PUD Amendment, we disagree that this means that the Board came up with an "artificial distinction" between an inpatient facility and outpatient facility with a residential facility. And even if a different decision could be reached, we cannot substitute our own judgment for that of the Board and reweigh the evidence. *See O'Dell*, 920 P.2d at 51. We must defer to a board's decision where there is evidence in the record to support it. *See Puckett v. City & Cty. of Denver*, 12 P.3d 313, 314 (Colo. App. 2000).

¶ 37 Further, although CCG and the Director initially sought approval for an inpatient facility, that does not mean CCG was foreclosed from operating two separate non-inpatient facilities. CCG's initial intent may have been to operate an inpatient facility, but it made clear it would operate an outpatient facility with a separate residential facility, and if it fails to do so an appropriate violation of zoning action may commence.

III. C.R.C.P. 57 Claims for Declaratory Relief

¶ 38 The district court determined that the Homeowners' claim for declaratory judgment was one challenging the 2009 PUD

Amendment based upon improper notice,[3] the 2009 PUD Amendment was a quasi-judicial action, and, therefore, Homeowners' claims should have been brought under C.R.C.P. 106(a)(4). It also concluded that the Homeowners had constructive notice that the 2009 PUD Amendment could be interpreted to replace the Lodge's clubhouse with one of thirty-three standalone uses in 2009, and therefore their claim — brought six years after the 2009 PUD Amendment — was time barred as outside the thirty-day statute of limitations period under C.R.C.P. 106.

¶ 39 On appeal, Homeowners allege that (1) the district court erred when it determined that site-specific zoning cannot be reviewed under C.R.C.P. 57; (2) it did not have adequate notice that the 2009 PUD Amendment allowed the Lodge's clubhouse to be replaced by thirty-three standalone uses; and (3) its claim did not accrue until the Board's 2016 interpretation under section 13-80-108(8), C.R.S. 2018, because they did not discover nor could they have discovered the Lodge's clubhouse could be eliminated until then. Defendant

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[3] Although the plaintiffs failed to raise inadequate notice before the Board, the Homeowners properly pleaded their notice claim before the district court; thus, we review it as relevant to the district court's dismissal of their C.R.C.P. 57 claim.

counters that (1) the 2009 PUD Amendment was quasi-judicial, and therefore it can only be reviewed under C.R.C.P. 106(a)(4); (2) the Homeowners had adequate notice of the impact of the 2009 PUD Amendment in 2009; and (3) section 13-80-108(8) does not change the accrual date because the Cordillera Declaration, the notice, and the plain language of the 2009 PUD Amendment put the Homeowners on constructive notice of the 2016 interpretation.

¶ 40 Although quasi-judicial actions are not properly brought under C.R.C.P. 57, we need not determine whether the 2009 PUD Amendment was quasi-judicial or quasi-legislative, because even if the Homeowners' claim could be brought under C.R.C.P. 57, it was filed outside the applicable two-year statute of limitations period. We also conclude that the Cordillera Declaration, the 2009 PUD Amendment notice, and the plain language of the 2009 PUD Amendment put the Homeowners on constructive notice of the 2016 interpretation, and their claim therefore accrued in 2009.

A. Standard of Review and Applicable Law

¶ 41 Where the relevant facts are undisputed, we review dismissals under both C.R.C.P. 12(b)(1) and 12(b)(5) de novo. *See Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7; *Burnett*

v. State Dep't of Nat. Res., 2015 CO 19, ¶ 11. Dismissal is proper where the complaint does not state plausible grounds for relief. *Warne v. Hall*, 2016 CO 50, ¶ 25.

¶ 42 C.R.C.P. 106(a)(4) provides for certiorari review whenever a "governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion." C.R.C.P. 106(a)(4); *see JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, 369 (Colo. App. 2007).

¶ 43 Although C.R.C.P. 106(a)(4) is generally the exclusive means of judicial review of quasi-judicial administrative decisions, a "claim under C.R.C.P. 57 is not precluded by the possibility of C.R.C.P. 106(a)(4) review of administrative agency action where C.R.C.P. 106(a)(4) review may be ineffective in addressing the issues raised by the petitioner." *Denver Ctr. for the Performing Arts v. Briggs*, 696 P.2d 299, 305 (Colo. 1985); *see Regennitter v. Fowler*, 132 Colo. 489, 494, 290 P.2d 223, 225 (1955) (stating that claims under both C.R.C.P. 106(a)(4) and C.R.C.P. 57 may be proper when C.R.C.P. 106(a)(4) is appropriate for certain issues but not others).

¶ 44 "Strict compliance with notice requirements for zoning is mandatory." *Bd. of Cty. Comm'rs v. Conder*, 927 P.2d 1339, 1353

(Colo. 1996). Public notice of a zoning proceeding must, at a minimum, specify the time, place, and subject matter of any public meeting, and "must also clearly apprise the public that the forthcoming public hearing relates to a proposed zoning change and the nature of the change." *Sundance Hills Homeowners Ass'n v. Bd. of Cty. Comm'rs*, 188 Colo. 321, 325, 534 P.2d 1212, 1214 (1975). Such notice must be intelligible to a layman. *Conder*, 927 P.2d at 1353. Due process has been found satisfied where opponents of an order were put on notice of a hearing and failed to object to the notice provisions. *Zavala v. City & Cty. of Denver*, 759 P.2d 664, 668 (Colo. 1988). "[O]nce having been put on notice, it was incumbent upon plaintiff[s] to peruse the provisions of the P.U.D." that was subject to the proceeding. *S. Creek Assocs. v. Bixby & Assocs., Inc.*, 753 P.2d 785, 787 (Colo. App. 1987), *aff'd*, 781 P.2d 1027 (Colo. 1989).

B. Analysis

¶ 45 We conclude that the district court properly dismissed the C.R.C.P. 57 claim as untimely filed because the plain language of the 2009 PUD Amendment was adequate to inform the Homeowners that the Lodge's clubhouse could be replaced by thirty-three

standalone uses, including the use at issue here, and, therefore, any challenge should have been brought within two years of the 2009 PUD Amendment. Further, when challenging the Board's interpretation of the 2009 PUD Amendment, the Homeowners had an adequate remedy under C.R.C.P. 106(a)(4).

¶ 46 Homeowners clearly state that they "are not challenging the amendment as it was adopted in 2009; rather, they are challenging the amendment as it was interpreted" in 2016. Their argument is either that (1) although they had adequate notice of the 2009 PUD Amendment, they had inadequate notice that it could be interpreted the way it was interpreted in 2016, and therefore the interpretation is invalid; or (2) the statute of limitations period did not accrue until the Board interpreted the 2009 PUD Amendment, because they could not have reasonably discovered the Lodge's clubhouse could be eliminated in 2009.

¶ 47 We reject the first argument because if Homeowners are challenging the *interpretation* of a valid PUD amendment — regardless of whether it is because of a failure to properly provide notice — it is limited to C.R.C.P. 106(a)(4) review, and the district court properly dismissed the declaratory judgment claim. *See*

Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622, 628 (Colo. 1988) (concluding that an approval of a development plan was quasi-judicial and subject to C.R.C.P. 106(a)(4) review because the approval applied to particular use of a particular site and did not affect the future land use on a city-wide basis). And if the interpretation itself is incorrect because of the notice, they should have brought the notice to the Board's attention, but, as discussed above, *supra* Part II.C.1, they failed to do so.

¶ 48 Because the Homeowners should have discovered any deficiencies in the notice at the time of the amendment — given the plain language of the 2009 PUD Amendment — they were on constructive notice that the amendment could be interpreted to replace the Lodge's clubhouse with any of thirty-three standalone uses, and thus we also reject the Homeowners' second argument regarding notice. *See Bixby*, 753 P.2d at 787 (property owner deemed to have constructive notice of zoning provisions applicable to property).

¶ 49 The notice in 2009 said:

> The purpose of this Plan Unit Development Amendment is to add clarity to the existing PUD Guide. This proposal does not introduce new or additional density or uses to the existing PUD, or otherwise substantively change the existing PUD. The proposed changes include corrections to typographical errors, replacement of inaccurate PUD Guide Maps, updates to reflect the current status of development approvals for the Lodge Parcel and Village Center Parcel and clarification of the treatment of the Lodge Parcel and the Village Center Parcel as a single planning parcel. The amendment clarifies the concept contained in the existing PUD that density shifts are permissible among the various planning parcels so long as the actual maximum densities for the project are not exceeded. Specifically the proposal clarifies that density is transferrable between the Lodge Parcel and the Village Center Parcel and that the permitted uses are the same for the Lodge Parcel and the Village Center Parcels effectively treating these adjacent areas as a single planning parcel. This treatment reflects existing development and the contemplated completion of the Lodge at Cordillera.

The Homeowners claim that this notice failed to inform them that the Lodge's clubhouse could be removed or replaced by a non-clubhouse use and that the notice misled them into believing they did not need to look at the 2009 PUD Amendment because it was not changing. We disagree for four reasons.

¶ 50 First, even before the 2009 PUD Amendment, there was no requirement that the Lodge remain as a Lodge, that the Homeowners would have access to it, that it be a clubhouse, or that the Lodge owner would stay the same. The Cordillera Declaration clearly states that the access is limited and could be removed at any time, and the 2009 PUD Amendment did not change that. To contend that the notice of the 2009 PUD Amendment was deficient because it did not inform them that the Lodge's clubhouse could be replaced by non-clubhouse uses is to misconstrue what rights the Homeowners had to the Lodge in general.

¶ 51 Second, the notice states that "the permitted uses are the same for the Lodge Parcel and the Village Center Parcels." At the very least this provision informed them that permitted uses were being addressed in the amendment — which would have directed them to examine the new language of the 2009 PUD Amendment. *See Bixby*, 753 P.2d at 787 ("[O]nce having been put on notice, it was incumbent upon plaintiff to peruse the provisions of the P.U.D. which contained these parking restrictions."). And if they had looked at section 2.01.1 of the 2009 PUD Amendment, the potential replacement of the Lodge's clubhouse with one of thirty-three other

standalone uses, including a "medical facility," would have been apparent. It states that "[t]he following uses are permitted within the Lodge Parcel of Planning Parcel A" and then lists thirty-four uses, only one of which is the "Clubhouse and Lodge building or buildings with related facilities." The structure of this provision would put a layman on notice that the community access to the clubhouse itself was not necessarily a required part of the Lodge Parcel.

¶ 52 Third, the notice comports with due process requirements. The Board sent letters to affected homeowners in the mail, posted a notice in the newspaper, and held a hearing, and the notice informed the Homeowners that some of the amendment pertained to the permitted Lodge uses. *See Russell v. City of Central*, 892 P.2d 432, 437 (Colo. App. 1995) ("At a minimum, the notice must include the 'date, time, and place of the hearing and apprise the public of the subject matter of the hearing and the nature of the proposed zoning change.'" (quoting *Hallmark Builders & Realty v. City of Gunnison*, 650 P.2d 556, 559 (Colo. 1982))).

¶ 53 Fourth, as stated previously, the CPOA reviewed the 2009 PUD Amendment and the notice and made specific changes to section

2.01.1, which listed the permitted uses of the Lodge. The CPOA rewrote the provision relating to medical office/facility use to read that it would be "limited to clinic and outpatient facilities for non-critical care, including, without limitation, outpatient plastic surgery and other cosmetic procedures." It thus approved clinic and outpatient uses on the Lodge Parcel in 2009, but raised no concerns, despite the plain language.

¶ 54 Contrary to the Homeowners' contention, section 13-80-108(1) does not save their claim. The statute provides that a cause of action generally "accrue[s] on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." § 13-80-108(1). Here, the cause of action accrued when the Homeowners were given notice of the 2009 PUD Amendment or, at the latest, when the hearing on the 2009 PUD Amendment occurred. As stated above, if the Homeowners had looked at the 2009 PUD Amendment and examined the way the Lodge Parcel and Village Center Parcel uses were changed, they would have known the Lodge's clubhouse could be replaced.

¶ 55 Finally, even if Homeowners receive the benefit of a two-year statute of limitation period under C.R.C.P. 57 — rather than the

thirty-day period under C.R.C.P. 106 — under section 13-80-102(1)(h), C.R.S. 2018 (two year limitations period for action against public or governmental entity), their claim is untimely. It was brought more than six years after it accrued, and, thus, the district court did not err in dismissing their C.R.C.P. 57 claim.

IV. Denial of Motion to Amend Complaint

¶ 56 The CPOA last contends that the district court erred in denying it an opportunity to amend its complaint, because its motion to amend was futile, to add a claim for declaratory relief under C.R.C.P. 57 based upon new information that CCG planned to operate an inpatient clinic. We are not persuaded.

A. Standard of Review and Applicable Law

¶ 57 C.R.C.P. 15(a) controls when "[a] party" may amend the pleadings. This rule encourages trial courts to look favorably upon motions to amend and reflects a liberal policy toward timely amendments to pleadings. Grounds for denying a motion to amend include undue delay, bad faith, dilatory motives, repeated failure to cure deficiencies in the pleadings by prior amendments, undue prejudice to the opposing party, and futility of amendment. *Benton v. Adams*, 56 P.3d 81, 85 (Colo. 2002).

¶ 58 Generally, determination of a motion to amend is within the sound discretion of the trial court, and a ruling on such a motion will only be overruled if that discretion is abused. *Polk v. Denver Dist. Court*, 849 P.2d 23, 25 (Colo. 1993). However, "[w]e review de novo a trial court's determination that amendment would be futile because the amended complaint could not survive a motion to dismiss." *Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 41.

¶ 59 "An amendment is futile if it could not withstand a motion to dismiss." *Id.* "When deciding whether a motion to amend pleadings is futile, the trial court must accept the moving party's allegations as true." *Benton*, 56 P.3d at 87.

B. Analysis

¶ 60 After the close of the C.R.C.P. 106(a)(4) briefing before the district court, two statements emerged from third parties relating to CCG's alleged intention to operate an inpatient facility in Cordillera. The first was a Denver Post newspaper article in which CCG purportedly stated that it intends to operate an "in-patient, private facility." The second was an investment overview, drafted by SMB Equity (a group assisting CCG with marketing), which stated:

> The 183-bed facility, made up of 110 in-patient residents, and 73 long term wellness suites will offer guests five-star accommodations and amenities to make their treatment as comfortable as possible.
>
> The cost for the intensive 30-day in-patient treatment ranges from $40,000-65,000.
>
> The cost for long term housing after in-patient treatment begins at $10,000 per month.

¶ 61 The record contains evidence that the day the Denver Post article was published, CCG requested a correction to the reporter's characterization of the proposed use as "in-patient" and the article was corrected the following day. Similarly, SMB Equity sent CCG an email acknowledging it had erroneously referred to the facility as "in-patient" despite CCG referring to the project as a "residential outpatient facility."

¶ 62 Even accepting the facts alleged by the CPOA as true — that the Denver Post article states that CCG intends to operate an inpatient facility and that the investment overview was marketing the facility as inpatient — we conclude that the CPOA's motion to amend was futile. First, the Board had already determined that the project is to be an outpatient facility, and CPOA's allegations that CCG made statements that the facility was to be an inpatient

facility had already been rejected. *See Am. Civil Liberties Union of Co. v. Whitman*, 159 P.3d 707, 713 (Colo. App. 2006) (stating that because the motion to amend made a claim with the same substantive basis as the original complaint, the motion to amend could not survive a motion to dismiss and was properly denied). If the district court had granted the motion to amend and allowed the C.R.C.P. 57 claim to proceed, the CPOA would have sought a ruling that CCG cannot operate an inpatient facility — the exact ruling the Board had already made. The Board considered CCG's intention to operate an inpatient facility, heard evidence as to CCG's plans, and determined that CCG's use was accepted so long as it operated an outpatient facility with a separate residential facility. Although the CPOA believes that the two separate uses are indistinguishable from inpatient use, the relief requested is not different than that already granted.

¶ 63 Second, the CPOA contends that if the facts it alleged are accepted as true, the only logical inference is that CCG will operate an inpatient facility, and it should not have to wait for the CCG to violate the Board's decision before it brings suit. However, even if it is true that third parties believe CCG intends to operate an

inpatient facility, that does not change the fact that the Board already determined that CCG cannot do so. The requested relief is futile because the CPOA is seeking no relief other than a ruling that CCG cannot operate an inpatient facility. Therefore, the CPOA can enforce the zoning regulation through an action under the zoning laws if the CCG violates the regulations.

V. Conclusion

¶ 64 The judgment is affirmed.

JUDGE FURMAN and JUDGE DUNN concur.

Court of Appeals

STATE OF COLORADO
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Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 27, 2018

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