DOUGLAS COUNTY
COLORADO

Supplemental Hearing
Staff Report

DATE: MARCH 27, 2024

TO: DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS

THROUGH: DOUGLAS J. DEBORD, COUNTY MANAGER

FROM: TERENCE T. QUINN, AICP, DIRECTOR OF COMMUNITY DEVELOPMENT

CC: MATT JAKUBOWSKI, AICP, CHIEF PLANNER
CURTIS J. WEITKUNAT, AICP, LONG RANGE PLANNING MANAGER
STEVEN E. KOSTER, AICP, ASSISTANT DIRECTOR OF PLANNING SERVICES
JEFFREY A. GARCIA, ESQ., COUNTY ATTORNEY

SUBJECT: **RANGE PLANNED DEVELOPMENT – SUPPLEMENTAL HEARING FOR WATER SUPPLY OVERLAY DISTRICT INTERPRETATION**

PROJECT FILE: ZR2020-023

OWNER:
COTTEREL FARMS, LLC
6288 MOFFAT FARM LANE
SALT LAKE CITY, UT 84121

REPRESENTATIVE:
JILL REPELLA
CORNERSTONE INSIGHT
10129 SUMMIT VIEW POINTE
HIGHLANDS RANCH, CO 80112

BOARD OF COUNTY COMMISSIONERS HEARING **APRIL 9, 2024 @ 2:30 PM**

I. REQUEST

The request is for the Board of County Commissioners (Board) to interpret the water supply documentation standards in *Douglas County Zoning Resolution (DCZR)* Section 1806A, provide the basis for such interpretation, and explain the manner in which it applies to the Range Planned Development (PD). The request is in response to a Court-ordered remand from the State of Colorado Court of Appeals.

II. BACKGROUND

The Range PD was approved unanimously by the Board at a December 2021 public hearing by a vote of 3-0. In January 2022, a neighboring property owner filed an appeal of that approval in Douglas County District Court. In November 2022, the District Court upheld the Board's decision, indicating that the Board did not abuse its discretion or misinterpret the *DCZR* in its review of the application. In December 2022, the District Court decision was appealed to the State of Colorado Court of Appeals. In November

2023, the Court of Appeals upheld all aspects of the Board's decision, but cited a lack of findings in how the Board interpreted and applied *DCZR* Section 1806A to the Range PD. The Court remanded the case to the Board "…for findings and conclusions as to how to interpret Section 1806A, the reasons therefor, and the manner in which it applies" relative to the Range PD application.

In particular, the State appellate court stated:

- *"The BOCC did not explicitly address which DCZR provision applied or interpret either provision; indeed, to the extent that it can be considered to have made an implicit ruling, all we can determine is that it found that NL Range's application was subject to the "letter of intent" requirement of section 1806A.01." (Remand Court Order page 19 in the attached appendix)*

- *Because the BOCC made no findings as to which section applied and why, we are unable to determine the basis for its implicit conclusion that section 1806A.01 applied. Without any findings or conclusions "sufficiently explicit" to give us "a clear understanding of the basis of its order," …we are unable to either meaningfully review the ruling or "defer" to the BOCC's interpretation of its own regulations." (Remand Court Order page 23 in the attached appendix)*

- *The best we can do, in this instance, is to reverse that part of the district court's order and remand with directions to return the matter to the BOCC for findings and conclusions as to how to interpret section 1806A, the reasons therefor, and the manner in which it applies to the facts in this case. (Remand Court Order page 23 in the attached appendix)*

III. STAFF ANALYSIS

The documentation standards in *DCZR* Section 1806A are established for the purpose of demonstrating during the County's review of a development that a water supply that is sufficient in terms of quantity, quality, and dependability will be available for the development. The stage of the development process involved and how the service will be provided dictate which documentation requirements are applied.

The Court of Appeals asked the Board to focus its interpretation upon how and why only *DCZR* Section 1806A.01, which applies to "individual applicants and non-District entities," is relevant to this rezoning for the Range PD.

The confusion at the Court of Appeals was with the wording of the relevant sections. *DCZR* 1806A.01 states that it is applicable to "individual applicants and non-District entities" while 1806A.02 applies to "District entities." This is problematic because as the District Court initially pointed out in their opinion - one appears to reference the "nature

of the applicant" while the other "the nature of the provider." Even in the Court of Appeals' oral arguments there was confusion about whether a provider included a District at any point in the supply chain, or a District that only provides service to end users.

This particular application involved a proposed PD rezoning with no established District currently able to provide water to end users on the site, although the applicant testified a future District would be formed after rezoning - if approved. The applicant also proposed that the future District's service to the development would be via a combination of underground water rights and a contract for offsite water supply. At the December 2021 public hearing, the Board considered whether 1806A.01 applied because at that moment in time there was no existing District formed to serve any new development this rezoning would enable, thus making the applicant subject to the documentation requirements for an individual or non-District entity. The Board implicitly accepted this interpretation at the hearing for the Range PD.

The application of the standards of 1806A.01 to the development was appropriate because no District was offering to provide service to end users at the site of this rezoning, thus no District was available to provide the documentation required under 1806A.02.

The application included evidence that a District (the City of Englewood) had interest in leasing approximately 200 acre-feet of water to the developer, NL Range, for NL Range to use in the Range PD. Thus, the City of Englewood, would not be responsible for providing service to the development, but only a water supply to whomever would ultimately provide such service. Section 1806A.02 applies when service is proposed by a District. "District" is defined in Section 18A:

"A special district currently offering water service, organized or validated pursuant to the Special District Act, §32-1-101, et seq., C.R.S.; or a non-specified governmental entity including, but not limited to, municipalities, authorities, and public improvement districts, as well as private water companies." (emphasis added)

Section 1806A.02.1 requires that when service is proposed by a District the applicant for a rezoning must provide a letter from that District indicating "The District's intent and ability to serve the development," as well as several other details regarding how it will provide that service. Here, there was not an existing District that could provide this information.

The applicant in this PD rezoning indicated water service would be provided by a yet to be created special district under Title 32 of the C.R.S. that would use a supply consisting of a combination of non-renewable water underlying the development and renewable water that would be acquired from other entities (such as the City of Englewood). But such a new special district cannot be formed until after "sufficient existing and projected need" for a new special district exists (§32-1-203(2)(a), C.R.S.). Rezonings are typically

used to establish such a need where one may not have existed prior to the change in allowed land use. Application of 1806A.02 to the Range PD in these circumstances produces an absurd result since the documentation required cannot be provided by a yet to be formed special district, the special district cannot be formed until a need is established, and that need could only be established AFTER a rezoning has occurred.

Additionally, the documentation required in 1806A.02 is beyond the scope of a contracted provider selling only a physical water supply to a future district, such as was proposed in this application. It is not the role or purpose of such a contracted provider to address the feasibility of infrastructure or the conditions of a commitment to serve. The contracted provider is only providing the resource (raw water) and not assuring the physical delivery of water to each end user within the boundaries of the proposed new development. After the yet to be formed special district is created, with the intent to provide service to each potential new end user, Section 1806A.02 will then apply to future stages of the development process.

During rezoning, preliminary documentation regarding the availability of water is acceptable. Applicants are not required to provide final contract agreements until subdivision. Section 1806A.02 will be applied to Range during any future subdivision only after a new special district has been formed to provide water service. Thus, it is appropriate, even necessary, to apply only Section 1806A.01 at rezoning when no special district is yet formed to fill the role of the District that will provide water service to the potential new end users created by the changed land use.

At a later stage in the development process, the County will carefully analyze the proposed water supply and delivery method with the proposed actual build out of the site to ensure adequacy. Pursuant to state statute (§29-20-303(1), C.R.S.), this determination may only be made once during the development process. Douglas County has chosen to make that determination at the subdivision or Site Improvement Plan stages since there will be sufficient relevant details known about the development, such as how many dwellings or commercial buildings will actually be built and exactly where they will be located, to assess the adequacy of the water supply. At rezoning, without these details set, the purpose of looking at the water is only to ensure enough water could be available for the new type or concentration of development being proposed. If an existing District is willing to serve each end user of this development, then different documentation is requested in accordance with Section 1806A.02. This includes describing the feasibility of extending infrastructure to serve the end users in the development. When no such District currently exists to serve potential new end users, then different documentation is required, and additional information will be available when the request to form a new special district comes before the County Commissioners.

The Board may adopt the analysis in this staff report that the applicant is not a District, and no District was available at the time of application to provide water service and thus Section 1806A.01 was applicable to the Range PD. The applicant provided the documentation required in Section 1806A.01 for an individual, non-district entity providing water service.

If the Board chooses to apply a different interpretation of the relevant parts of the *DCZR* to this applicant, that may affect the overall approval and a further hearing may be necessary to determine whether the new interpretation invalidates the previous approval of the Range PD rezoning.

ATTACHMENTS **PAGE**

1806A Documentation Standards

The following documentation standards are established for the purpose of demonstrating that definite provision has been made for a water supply that is sufficient in terms of quantity, quality, and dependability *[§30-28-133 (3)(d), C.R.S.]* in accordance with the water source standards of the water supply zone in which the proposed development lies.

1806A.01 For individual applicants and non-District entities:

Renewable Water – when service is proposed by renewable tributary water rights the following documentation standards shall apply:

1806A.01.1 For rezonings and Planned Development amendments to increase the number of dwelling units, increase the Planned Development boundary, or change allowed land use categories, the applicant shall submit a letter stating the intent to obtain renewable water rights or a copy of the conditional water right(s) as decreed by the court.

1806A.01.2 For preliminary plan, minor development final plat, use by special review, and site improvement plan applications for legal unplatted parcels the applicant shall submit:

(1) A letter from a qualified attorney stating ownership by the applicant of, or an executed contract granting rights to the applicant for, adjudicated renewable water rights and a copy of the court decree adjudicating the renewable water rights.

(2) An adjudicated Augmentation Plan, if required by the Colorado State Engineer, and a copy of the court decree adjudicating the Augmentation Plan. An adjudicated Augmentation Plan shall be submitted prior to the scheduling of a public meeting or public hearing for the application.

(3) A Water Plan.

1806A.01.3 For final plat applications where the previous preliminary plan review process did not undergo the review in Section 1806A.01.2, the application shall be subject to review under the standards of Section 1806A.01.2. For all other final plat applications the applicant shall submit:

(1) A letter from a qualified attorney reaffirming renewable water rights ownership by the applicant and either verifying that the statements made in the letters and reports for the previous review process are still true and accurate, or identifying what conditions have changed since the previous review process. If proposed changes have the potential impact the applicant's

ability to serve the subdivision, the applicant shall submit updated letters and reports as set forth in Section 1806A.01.2.

Nonrenewable Water – when service is proposed from Margin B and Central Basin Water Supply Zones, the following documentation standards shall apply:

1806A.01.4 A letter from a qualified attorney stating ownership by the applicant of, or an executed contract granting rights to the applicant for, adjudicated water rights and a copy of the court decree adjudicating the water rights.

1806A.01.5 An adjudicated Augmentation Plan, if required by the Colorado State Engineer, and a copy of the court decree adjudicating the Augmentation Plan. An adjudicated Augmentation Plan shall be submitted prior to the scheduling of a public meeting or public hearing for the application.

1806A.01.6 Proof that the water rights in all Denver Basin aquifers have been reserved in perpetuity, for the benefit of future landowners within the proposed development, pursuant to a declaration of restrictive covenants in a form prescribed by the County.

1806A.01.7 A Water Plan.

1806A.02 For District entities:

When service is proposed by a District, the applicant shall submit documentation of the District's ability to serve, the amount of water available, and the feasibility of extending service.

1806A.02.1 For rezonings or Planned Development amendments to increase the number of dwelling units, increase the Planned Development boundary, or change allowed land use categories the applicant shall submit:

(1) A letter from the District referencing the development name (as submitted to the County), stating:

(a) The District's intent and ability to serve the development.
(b) The conditions under which the District will commit to serving the development.
(c) The estimated demand of the development based on the water demand standards as established in Section 1805A.
(d) The proposed uses, the allowed uses of the District's water rights, and that the proposed uses correspond to the allowed uses of the District's water rights.
(e) The feasibility of extending service to the development.

(2) A Water Supply Report from the District.

1806A.02.2 For preliminary plan and minor development final plat applications, the applicant shall submit:

(1) A letter from the District referencing the subdivision name (as submitted to the County), stating:

(a) The District's commitment to serve the subdivision.
(b) That the commitment is irrevocable, or the conditions under which the commitment may be revoked.
(c) That the property that is the subject of the application has been included in the District or is served by contract.
(d) The estimated demand of the subdivision based on the water demand standards as established in Section 1805A.
(e) The amount of water that can be supplied to the subdivision pursuant to deeded water, contracts, and/or IGAs.
(f) The proposed uses, the allowed uses of the District's water rights, and that the proposed uses correspond to the allowed uses of the District's water rights.
(g) The feasibility of extending service to the development.

(2) A Water Supply Report from the District.

(3) Evidence concerning the potability of the proposed water supply for the subdivision. *[§30-28-133(3)(d), C.R.S.]*

(4) Proof that the water rights in all Denver Basin aquifers have been reserved in perpetuity, for the benefit of future landowners within the proposed development, pursuant to a declaration of restrictive covenants in a form prescribed by the County.

(5) When service is proposed though an intergovernmental agreement (IGA), the applicant shall provide evidence that the IGA has been executed by both parties.

(6) When service is proposed by a New Special District, an applicant shall provide evidence that the new special District has been organized.

1806A.02.3 For final plat applications where the previous preliminary plan review process did not undergo the review in Section 1806A.02.2, the application shall be subject to review under the standards of Section 1806A.02.2. For all other final plat applications the applicant shall submit:

(1) A letter from the District reaffirming its commitment to serve and either verifying that the statements made in the letters and reports for the previous review process are still true and accurate, or identifying what conditions have changed since the previous review process. If proposed changes have the potential to impact the District's ability to serve the subdivision, the applicant shall submit updated letters and reports as set forth in Section 1806A.02.2.

(2) Evidence that the water rights to serve the subdivision have been conveyed to the District and are available for the intended uses, and that the water credits to serve the subdivision have been purchased from the District (as necessary) and/or the water supply is the subject of a fully-executed contract or IGA with another water supply provider in which all of the terms and conditions of the contract and/or IGA have been fully satisfied, as confirmed by a signed will-serve letter from the provider of the water supplies.

(3) To the extent that water supplies are to be provided by a separate water supply entity by contract or IGA, evidence that all of the necessary infrastructure is in place and is capable of providing water to the District.

1806A.02.4 For a use by special review application or for a site improvement plan application for legal unplatted parcels, the applicant shall submit:

(1) A letter from the District referencing the development name (as submitted to the County), stating:

(a) The District's commitment to serve the development.
(b) That the commitment is irrevocable, or the conditions under which the commitment may be revoked.
(c) Whether the property that is the subject of the application has been included in the District.
(d) The estimated demand of the development based on the water demand standards as established in Section 1805A.
(e) The amount of water that can be supplied to the development.
(f) The proposed uses, the allowed uses of the District's water rights, and that the proposed uses correspond to the allowed uses of the District's water rights.
(g) A statement regarding the feasibility of extending service to the development.

(2) A Water Supply Report from the District.

(3) Evidence concerning the potability of the proposed water supply for the subdivision. *[§30-28-133(3)(d), C.R.S.]*

(4) Proof that the water rights in all Denver Basin aquifers have been reserved in perpetuity, for the benefit of future landowners within the proposed development, pursuant to a declaration of restrictive covenants in a form prescribed by the County.

1807A New Special District Service Plan Submittal Requirements

The organization of a New Special District to provide water service is authorized by §32-1-201, et seq., C.R.S. The Board is authorized by §32-1-203, C.R.S., to review and approve the service plan.

When a New Special District Service Plan or a Service Plan Amendment to authorize provision of water service is proposed, the applicant shall submit:

1807A.01 An attorney's opinion letter stating ownership by the applicant(s) of adjudicated water rights and a copy of the court decree adjudicating the water rights.

1807A.02 An adjudicated Augmentation Plan, if required by the Colorado State Engineer, and a copy of the court decree adjudicating the Augmentation Plan. An adjudicated Augmentation Plan shall be submitted prior to the scheduling of a public hearing for the application.

1807A.03 A Water Plan.

1807A.04 Water demand standards as established in Section 1805A.

1807A.05 For service plan provisions to use Denver Basin wells in Margin B and Central Basin Water Supply Zones, the service plan shall include a well-field analysis that demonstrates that such wells will not adversely impact existing water rights on adjoining lands, considering the statutory requirement that material injury does not result solely from reductions of hydrostatic pressure or water level in an aquifer.

1807A.06 When a New Special District Service Plan proposes to use a water supply from another District that has not been previously reviewed subject to the requirements herein, the service plan shall include information from the District in accordance with Section 1806A.02.2.

1807A.07 Proof that the water rights in all Denver Basin aquifers have been reserved in perpetuity, for the benefit of future landowners within the proposed development, pursuant to a declaration of restrictive covenants in a form prescribed by the County.

DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 JUSTICE WAY, CASTLE ROCK, CO, 80109-7546	
Plaintiff(s) SUSAN POET et al. v. **Defendant(s)** THE BD OF CNTY COMM OF DOUGLAS CNTY et al.	DATE FILED: January 29, 2024 2:39 PM CASE NUMBER: 2022CV30015 ⚠ **COURT USE ONLY** ⚠ Case Number: 2022CV30015 Division: 5 Courtroom:

ORDER ON REMAND

The motion/proposed order attached hereto: ACTION TAKEN.

Pursuant to the attached Order from the Court of Appeals, this Court orders as follows:

This case is returned to the Douglas County Board of County Commissioners for further findings consistent with the attached Order. Specifically, the Board of County Commissioners is ordered to make "findings and conclusions as to how to interpret section 1806A, the reasons therefor, and the manner in which it applies to the facts of this case." Order at 23 para. 55.

SO ORDERED.

Issue Date: 1/29/2024

GARY MICHAEL KRAMER
District Court Judge

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 22, 2024
Douglas County 2022CV30015	
Plaintiffs-Appellants: Susan Poet; Randall Poet; and Susan Poet LLC, a Colorado limited liability company; **v.** **Defendants-Appellees:** Board of County Commissioners of Douglas County, Colorado, a political subdivision of the State of Colorado (including all of the individual Commissioners in their official capacity, Chair Abe Laydon, George Teal and Lora Thomas) and NL Range LLC, a Colorado limited liability company.	Court of Appeals Case Number: 2022CA2232
MANDATE	

This proceeding was presented to this Court on the record on appeal. In accordance with its announced opinion, the Court of Appeals hereby ORDERS:

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

POLLY BROCK
CLERK OF THE COURT OF APPEALS

DATE: JANUARY 22, 2024

COLORADO COURT OF APPEALS

DATE FILED: November 30, 2023

Court of Appeals No. 22CA2232
Douglas County District Court No. 22CV30015
Honorable Jeffrey K. Holmes, Judge

Susan Poet, Randall Poet, and Susan Poet LLC, a Colorado limited liability company,

Plaintiffs-Appellants,

v.

Board of County Commissioners of Douglas County, Colorado, a political subdivision of the State of Colorado (including all of the individual Commissioners in their official capacity, Chair Abe Laydon, George Teal, and Lora Thomas) and NL Range, LLC, a Colorado limited liability company,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE DAILEY
Dunn and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 30, 2023

Ireland Stapleton Pryor & Pascoe, PC, James R. Silvestro, Denver, Colorado, for Plaintiffs-Appellants

WATLegal LLC, William A. Tuthill, Arvada, Colorado; Lance J. Ingalls, County Attorney, Kelly Dunnaway, Christopher K. Pratt, Castle Rock, Colorado, for Defendant-Appellee Board of County Commissioners of Douglas County, Colorado

Davis Graham & Stubbs LLP, Brandee L. Caswell, Theresea Wardon Benz, Lindsey P. Folcik, Denver, Colorado, for Defendant-Appellee NL Range

¶ 1 Plaintiffs, Susan Poet, Randall Poet, and Susan Poet LLC (the Poets), appeal the district court's order upholding the approval defendant Douglas County Board of County Commissioners (BOCC) gave for defendant NL Range's application to rezone a 399-acre parcel of land (the Property). We affirm in part, reverse in part, and remand for further proceedings.

I. Background

¶ 2 The Poets own land adjacent to the Property, which is located south of Highlands Ranch and directly opposite the town of Louviers in the US Highway 85 corridor. Before this action, most of the Property had been zoned "A-1" for agricultural use, with the remainder zoned "RR" for rural residential use.

¶ 3 "The A-1 zone district is characterized by large-acreage farms, ranches, open areas, farm houses, units for agricultural workers and their families, and other uses allowed which enhance and promote the openness and general rural nature characteristic of the County." Douglas County Zoning Resolution § 301 (2021) (DCZR). The RR zone district is "characterized by large-lot residential homesites and other accessory uses which enhance the basic elements of a balanced residential area, such as, schools, parks,

neighborhood recreational facilities, and open space." DCZR § 501. For both district types, "[e]xpansion of urban development into rural areas is a matter of public concern because of the potential of unnecessary increases in service costs, conflicts between agricultural and urban activities, and the loss of open space and the natural landscape." DCZR §§ 301, 501.

¶ 4 The Property's owner, NL Range, wants to redevelop it as a subdivision featuring 550 residential lots. Consequently, in 2020 it applied to rezone the Property as a Planned Development ("PD") district.[1]

¶ 5 In support of its application, NL Range submitted voluminous materials to County staff, the County Planning Commission, and, ultimately, the BOCC. Among those materials was documentation concerning the availability of nonrenewable water (i.e.,

[1] A Planned Development zone district "is characterized by neighborhoods balanced in terms of scale and identity and as a complete community with adequate schools, parks, employment opportunities, convenience retail, health services, and public transit." Douglas County Zoning Resolution § 1501 (2021) (DCZR).

groundwater) on the Property[2] and NL Range's letter of intent to contract with Dominion Water and Sanitation District (Dominion) for renewable water services and sewer services. A week before the original BOCC hearing date, however, Dominion withdrew from consideration as the Property's water and sewer services provider, and NL Range was granted a two-month continuance until December 14, 2021.

¶ 6 In mid-November, NL Range removed any reference to Dominion from its proposed planned development materials and notified County Planning staff that it was "negotiating with the City of Englewood to obtain up to 200 [acre feet] of renewable surface water rights" to support its proposed development. Before the December hearing, NL Range submitted letters of intent to (1) lease water rights from the City of Englewood and (2) provide central sewer services for the Property. It also provided (3) a letter from the City of Englewood, expressing its intent to lease annually 200 acre-feet of water to NL Range's development; and (4) an email from the

[2] NL Range submitted documentation of ownership, restrictive covenants, and a water plan regarding its nonrenewable water rights.

South Platte Renew (SPR) facility, confirming that it had adequate capacity for the development's projected sewer needs.[3]

¶ 7 At the hearing, the BOCC unanimously approved NL Range's rezoning request, conditioned, however, upon NL Range (1) making any minor or technical corrections to the plan document to the satisfaction of Douglas County; and (2) satisfying all commitments it had made, whether in writing or at the BOCC hearing.[4]

¶ 8 The Poets filed a C.R.C.P. 106(a)(4) action seeking judicial review of the BOCC's decision. Before the district court, the Poets contended that the BOCC abused its discretion by, among other things, approving the rezoning request (1) despite the lack of competent evidence that NL Range had obtained a sufficient water supply for the proposed development; (2) despite the lack of competent evidence that the proposed development would be supported by the necessary sanitary sewer infrastructure; and (3)

[3] All four documents were submitted to Douglas County Planning staff via email.

[4] These commitments included the provision of water and sanitary sewer services.

based on a substantially changed application that had not undergone the full administrative review required by the DCZR.

¶ 9 The district court rejected the Poets' contentions and affirmed the BOCC's rezoning decision. The Poets now appeal, on the same grounds mentioned above.

¶ 10 We affirm in part, reverse in part, and remand with directions to return this matter to the BOCC for further proceedings.

II. Standard of Review

¶ 11 "C.R.C.P. 106(a)(4) permits judicial review of a governmental agency action exercising a quasi-judicial role." *Save Our Saint Vrain Valley, Inc. v. Boulder Cnty. Bd. of Adjustment*, 2021 COA 44, ¶ 26.

¶ 12 "Review of a governmental body's decision pursuant to Rule 106(a)(4) requires an appellate court to review the decision of the governmental body itself rather than the district court's determination regarding the governmental body's decision." *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008) (citation omitted). Thus, we do not defer to the district court's decision. *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 8.

¶ 13 "In a Rule 106(a)(4) proceeding, our review is limited to whether the governmental body's decision was an abuse of discretion or was made in excess of its jurisdiction, based on the evidence in the record before that body." *Id.* at ¶ 7. An "agency abuses its discretion when its decision is (1) not supported by any competent evidence in the record — that is, 'so devoid of evidentiary support' that the decision is arbitrary and capricious — or (2) based upon misconstruing or misapplying the law." *Saint Vrain Valley*, ¶ 28 (quoting *Rangeview, LLC v. City of Aurora*, 2016 COA 108, ¶ 16). The burden is on the Poets to overcome the presumption that the BOCC's actions were proper. *Marshall v. Civ. Serv. Comm'n*, 2016 COA 156, ¶ 21.

¶ 14 Because of the ultimate manner in which we resolve this case, we address the issues raised on appeal in this order: (1) sufficiency of the evidence to support sewer services; (2) late modifications to the application for rezoning; and (3) sufficiency of evidence to support water service.

III. Sewer Service

¶ 15 The Poets argue that NL Range's sewer plan did not meet the requirements of DCZR sections 1503.04 and 1506.10. We disagree.

¶ 16 As the General Assembly recognizes, a new development may go through several stages, including rezoning; planned unit development; use permits; subdivision, development, or site plans; and new construction. *See* §§ 29-20-103(1), 29-20-303(1), 30-28-133(3)(d), C.R.S. 2023; *see also* DCZR §§ 1806A.01-.02 (recognizing rezoning, preliminary plan, final plat, use by special review, and site improvement plan stages).

¶ 17 Under section 1503.04, the BOCC must consider, in connection with a rezoning request, "whether the application demonstrates public facilities and services necessary to accommodate the proposed development will be available concurrently with the impacts of such development." Section 1506.10 requires "[d]ocumentation of the physical and legal capability to provide sanitation."

¶ 18 NL Range asserts that the necessary documentation was submitted. "Physical capability" was addressed in an email from the Director of the SPR facility confirming that it had "adequate capacity for the projected sewer treatment needs of the NL Range development." "Legal capability" was addressed in another email in which NL Range (1) expressed its intent to "provide central sanitary

sewer service for the Range PD . . . either through an inclusion agreement or an I[nter] G[overnmental] A[greement]" with a title 32 special district; and (2) said that it "anticipated that contractual arrangements for such service will be undertaken and completed in conjunction with obtaining contractual commitments [from SPR's co-owners, Englewood and Littleton] regarding central water service for the development." NL Range also said that confirmation of the providers, treatment capacities, and service contracts would be supplied at the preliminary plan application stage of the subdivision platting process for the PD district.

¶ 19 No statute or DCZR provision requires demonstration of adequate sewer facilities at the rezoning stage. Because NL Range submitted some evidence regarding its plans to provide sewer facilities, we must uphold the BOCC's decision. *Compare Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) (affirming Board's decision where evidence in the record supported it), *with Hajek v. Bd. of Cnty. Comm'rs*, 2020 COA 28, ¶23-28 (holding that the Board abused its discretion when it approved a development permit where the record was silent on statutorily required information). This is particularly true because the BOCC approved

the rezoning on the condition that NL Range follow through with all of its commitments and promises. *See King's Mill Homeowners Ass'n v. City of Westminster*, 192 Colo. 305, 312, 557 P.2d 1186, 1191 (1976) ("The power to impose conditions on rezoning is an exercise of the police power and such conditions are valid as long as they are reasonably conceived.").

¶ 20 We perceive no abuse of discretion by the BOCC.

IV. Modified Application

¶ 21 We also reject the Poets' contention that the BOCC abused its discretion in rezoning the Property based on a substantially changed application that had not undergone full administrative review. According to them, the eleventh-hour nature of the changes violated their due process rights to understand and comment on the rezoning proposal.

¶ 22 DCZR section 1505.09 provides, in part:

> The B[OCC] shall evaluate the rezoning request, staff report, referral agency comments, applicant responses, the Planning Commission recommendation, and public comment and testimony, and shall approve, approve with conditions, continue, table for further study, remand to the Planning Commission, or deny the rezoning request.

¶ 23 The record reflects that the Board approved NL Range's application for rezoning after going through all these steps. Significantly, nothing in the DCZR provisions addresses the effect of proposed modifications to the application, much less compels the conclusion that the process must be re-started, from the very beginning, anytime a modification is made to the application.

¶ 24 There must, however, be some limit to the type of modifications that can be made without having to restart the process; otherwise an applicant would be allowed "to make wholesale changes to its application without providing" procedural due process in the form of "adequate notice to the public and a reasonable opportunity to respond to those changes." *Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 908 (Colo. App. 2006).

¶ 25 In *Canyon Area Residents*, a division of this court held that a Board of County Commissioners abused its discretion by approving "substantial" changes or revisions to an application that were submitted after the public testimony was closed. *Id.* at 909. A communications company had applied to rezone a section of land to replace an existing telecommunications tower with a new tower.

After holding a hearing in which most citizens opposed the rezoning, the Jefferson County Planning Commission denied the application. The company appealed to the Board, which approved the application after substantial changes had been made to it following a meeting in which public testimony had been closed. The division held that the Board "abused its discretion by permitting the Applicants to change their proposal after the public testimony was closed without giving the public an adequate opportunity to be heard." *Id.*

¶ 26 Unlike the present case, *Canyon Area Residents* involved (1) a local zoning ordinance that expressly required substantial changes to an application be made twenty-one days before a public hearing; and (2) circumstances in which the Board permitted the applicants to make substantial changes to their proposal after the opportunity for public testimony had ended. *Id.* at 908.

¶ 27 Indeed, NL Range made no changes to its application *after* the BOCC hearing. And Susan Poet testified before the Planning Commission, sent in letters detailing her concerns about aspects of the rezoning proposal, and, after receiving notice of the proposed water and sewer provider changes, testified at the BOCC hearing.

At that hearing, she criticized the last-minute nature of the changes to the water supply proposal while conceding she had over a week's notice of them: "The first information . . . about the proposal using Englewood water was made public on December 6th, so eight days ago. This is not really enough time for the public to study and comment." Yet she offered no reason why such time was insufficient to review and provide input on the nature of the changed proposed water and sewer supplier.

¶ 28 Further, the "modifications" to NL Range's application were not sufficiently substantial as to warrant repeating the process. The modifications were relatively minor, inasmuch as they (1) did not enlarge the Property that was to be rezoned; and (2) affected only the source, but not the content or ratio or volume, of potential water and sewer service. And the BOCC approved the rezoning on the condition that NL Range follow through on the commitments made in the application.

¶ 29 Because the public, including the Poets, was given advance notice of rather non-substantial changes and was able to address them at the hearing, *Canyon Area Residents* is readily distinguishable from the present case. *See Griswold v. City of*

Homer, 34 P.3d 1280, 1285 (Alaska 2001) ("[A]mended [zoning] ordinances must be resubmitted only if the amendment results in a material change to the subject covered by the ordinance. . . . [A]mendments must be 'so substantial as to change [the] basic character' of the ordinance in order to require the process to be repeated . . . ." (quoting *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1119 (Alaska 1978))).

¶ 30 In so concluding, we also reject, as misplaced, the Poets' reliance on *Colorado Leisure Products, Inc. v. Johnson*, 187 Colo. 443, 532 P.2d 742 (1975), for a contrary result. In that case, the supreme court applied section 30-28-116, C.R.S. 2023, which provides in pertinent part:

> From time to time the 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. Any such amendment shall not be made or become effective unless the same has been proposed by or is first submitted for the approval, disapproval, or suggestions of the county planning commission.

¶ 31 Speaking of this provision, the supreme court said,

> Although the board is granted the authority to pursue amendatory action, the power is by no

> means unfettered. If the board of county commissioners is considering a possible amendment to a previously zoned area, the amendment cannot become effective until the planning commission has had the opportunity to study the problem and the proposal and to convey its responses regarding the suggested change to the board.

Colo. Leisure Prods., 187 Colo. at 447, 532 P.2d at 744.

¶ 32 We read the "amendment" to which the statute refers to be the proposed amendment to the zoning ordinance, and not, as the Poets would have it, an amendment to or modification of a rezoning application. And indeed, that is how the supreme court applied it in *Colorado Leisure*, which involved an application to rezone 80 acres of a 160-acre agricultural tract for "Economic Development." *Id.* at 445-47, 532 P.2d at 743-44. However, the Board rezoned the entire 160-acre tract to a "General Industrial" zone. *Id.* The court remarked that the amendment the Board passed "was neither proposed by the planning commission nor submitted for commission consideration." *Id.*

¶ 33 In the present case, neither the size of the Property nor its proposed zoning classification was changed by the BOCC. And while proposed water and sewer providers did change, the water

plan proposed at the BOCC hearing was still based on the same combination of renewable and ground water, and NL Range's intent to obtain renewable water and to provide sewer service had not changed.

¶ 34 Moreover, the court in *Colorado Leisure* noted that the Planning Commission had not had an opportunity to weigh in on the amendment that was approved. The Planning Commission in the present case, however, unanimously recommended the BOCC approve the application to rezone the Property despite knowing that Dominion might not ultimately supply the requisite water and sewer services. The Planning Commission, then, anticipated that the source of some of the water and sewer service for the Property could change.

¶ 35 All in all, we conclude that the BOCC did not abuse its discretion in approving the application for rezoning without first remanding it for further consideration by the Planning Commission.

V. Water Service

¶ 36 Finally, the Poets contend that the BOCC erred, in part, because it did not require NL Range to support its rezoning application with proof of an enforceable contract for supplying

renewable water to the proposed PD district. We conclude that a remand is necessary for further proceedings.

¶ 37 State law requires "adequate evidence" of a sufficient water supply for a new development. § 30-28-133(3)(d), C.R.S. 2023. But, as noted earlier, a new development may go through several stages, including rezoning; planned unit development; use permits; subdivision, development, or site plans; and new construction. And a local government has the discretion to determine the stage in which an applicant must demonstrate the adequacy of a proposed water supply; it is prohibited from requiring an applicant to make more than one such demonstration. § 29-20-303(1), C.R.S. 2023; *see also* § 29-20-301(1)(c), C.R.S. 2023.

¶ 38 At issue is what showing NL Range had to make at this, the rezoning stage of development.

¶ 39 DCZR section 1503 sets forth ten criteria the BOCC must consider in reviewing rezoning applications for a planned development. As pertinent here, the BOCC had to consider whether NL's application "is in conformance with Section 18A, Water Supply Overlay District, herein." DCZR § 1503.10.

¶ 40 DCZR section 1806A provides,

> The following documentation standards are established for the purpose of demonstrating that definite provision has been made for a water supply that is sufficient in terms of quantity, quality, and dependability (§ 30-28-133 (3)(d), C.R.S.) in accordance with the water source standards of the water supply zone in which the development lies.

¶ 41 Section 1806A.01 — titled "For individual applicants and non-District entities" — requires, "when service is proposed" with respect to renewable water, "[f]or rezonings[,] . . . a letter stating the intent to obtain renewable water rights or a copy of the conditional water right(s) as decreed by the court." DCZR § 1806A.01.1.[5]

¶ 42 In contrast, section 1806A.02 — titled "For District entities" — requires that, "[w]hen service is proposed by a District," "[f]or rezonings," the applicant must submit

> (1) A letter from the District referencing the development name (as submitted to the County), stating:
> (a) The District's intent and ability to serve the

[5] In contrast, considerably more — and different — documentation is needed with respect to (1) renewable water, at other stages in the process (i.e., preliminary plan, final plat, use by special review, and site improvement plan applications); and (2) nonrenewable water, at any stage. *See* DCZR § 1806A.01.2-.7 (referencing requirements such as letters from attorneys attesting to various things, contracts, court decrees adjudicating water rights, adjudicated Augmentation Plans, and water plans).

development.

(b) The conditions under which the District will commit to serving the development.

(c) The estimated demand of the development based on the water demand standards as established in Section 1805A.

(d) The proposed uses, the allowed uses of the District's water rights, and that the proposed uses correspond to the allowed uses of the District's water rights.

(e) The feasibility of extending service to the development.

(2) A Water Supply Report from the District.

DCZR § 1806A.02.1.[6]

¶ 43 On its face, NL Range's submitted documentation satisfies, at best, section 1806A.01, but not section 1806A.02.

¶ 44 Which provision is applicable depends on an interpretation of the DCZR, which we review de novo. *State ex rel. Coffman v. Robert J. Hopp & Assocs., LLC*, 2018 COA 69M, ¶ 43.

¶ 45 "In construing an administrative regulation, we apply the same rules of construction that we would apply in interpreting a statute." *Brunson v. Colo. Cab Co.*, 2018 COA 17, ¶ 10. "[A]s with

[6] In contrast, different documentation is needed with respect to water at other stages in the process (i.e., preliminary plan, final plat, use by special review, and site improvement plan applications). *See* DCZR § 1806A.02.2-.4.

statutes, if the language of a regulation is clear and unambiguous, we do not resort to other rules of construction." *Id.*

¶ 46 However, "if the language of a regulation or administrative rule is ambiguous or unclear, we may consider an agency's interpretation of its own regulation or rule." *Id.* at ¶ 11; *see Pilmenstein v. Devereux Cleo Wallace*, 2021 COA 59, ¶ 16 ("Only when the language of a regulation is ambiguous or unclear may we consider the agency's interpretation of the regulation."). In that instance, "we give great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law." *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007).

¶ 47 The BOCC did not explicitly address which DCZR provision applied or interpret either provision; indeed, to the extent that it can be considered to have made an implicit ruling, all we can determine is that it found that NL Range's application was subject to the "letter of intent" requirement of section 1806A.01. *See Sundance Hills Homeowners Ass'n v. Bd. of Cnty. Comm'rs*, 188 Colo. 321, 328-29, 534 P.2d 1212, 1216 (1975) (recognizing that express findings are not required if the necessary findings can be

implied from the action taken); *accord No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs*, 2022 COA 6M, ¶¶ 84-86.

¶ 48 The problem is: we don't know why the BOCC found section 1806A.01 applicable.

¶ 49 Section 1806A.01 on its face appears to apply to "applicants" for planned developments, whether "individuals" or "non-Districts." NL Range — the applicant here — is not an "individual," nor was it a "District." *See* DCZR § 1810A.06 (defining "District" as "*[a] special district* currently offering water service, organized or validated pursuant to the Special District Act, § 32-1-101, et seq., C.R.S.; *or a non-specified governmental entity* including, but not limited to, municipalities, authorities, and public improvement districts, as well as private water companies") (emphasis added). So, if limited to the identity of the applicant, section 1806A.01 could have applied.

¶ 50 But, as the district court recognized, the provisions of section 1806A are "not a model of clarity." As the court pointed out, section 1806A.01 "appears to focus on the nature of the applicant," whereas section 1806A.02 "appears to focus on the nature of the

water provider, since, generally speaking a District would not be an applicant." (Emphasis added.) According to the court,

> [h]armonizing these provisions . . . involves recognizing that both actually focus on *the proposed source of the water*. The term "District" . . . contemplates an entity currently in existence and that is presently providing water services, and which will be responsible for delivery of its services to the proposed development.
>
> . . . *The exclusive source of water was not an existing District as provided in section .02*. Instead, water would be supplied by a combination of renewable and non-renewable water and *a yet to be created special district to handle implementation, as addressed in .01*.

(Emphasis added.)

¶ 51 The text of sections 1806A.01 and .02 speak in terms of "applicant[s]," and "service" "by" or "from" various individuals or entities. Further, the district court's reading of the provisions reasonably introduces a "water source" concept. Frankly, we can discern no basis upon which to determine which of these is the defining criteria for determining the applicability of sections 1806A.01 and .02. In our view, it is equally likely that the "applicant," the "source of the water," or the "service provider" could

be the defining criteria. And, of course, not all of the criteria lead to the same result.

¶ 52 At the BOCC hearing, NL Range representatives testified that (1) the "source of [renewable] water" would be the City of Englewood, a "District" under DCZR definitions, *see* DCZR § 1810A.06; (2) Roxborough Water and Sanitation District would deliver the renewable water to the planned development site as the "end service provider"; and (3) NL Range planned to form a special district to function, essentially, as the ultimate water "service provid[er]."[7]

¶ 53 NL Range, then, could theoretically be the "applicant," and its yet-to-be-formed special district, the "service provider," both of which could invoke the applicability of section 1806A.01. But Englewood is the "source of the water," and, if that were the defining criteria, section 1806A.02 would apply, since, under the

[7] At oral arguments, defendants' counsel described the "service provider" as the entity to whom one pays the bill for water service. Counsel cited no authority, nor developed any argument for that proposition. Nonetheless, we acknowledge the possibility that, as the last entity in the link of entities providing water service, NL Range's special district could be considered the ultimate "service provider."

DCZR, Englewood is a "District." And because it was to deliver the water, Roxborough Sanitation District could be considered "a" "service provider" — again invoking section 1806A.02.

¶ 54 Because the BOCC made no findings as to which section applied and why, we are unable to determine the basis for its implicit conclusion that section 1806A.01 applied. Without any findings or conclusions "sufficiently explicit" to give us "a clear understanding of the basis of its order," *Rocky Mountain Health Maint. Org., Inc. v. Colo. Dep't of Health Care Pol'y & Fin.*, 54 P.3d 913, 918 (Colo. App. 2001), we are unable to either meaningfully review the ruling or "defer" to the BOCC's interpretation of its own regulations.

¶ 55 The best we can do, in this instance, is to reverse that part of the district court's order and remand with directions to return the matter to the BOCC for findings and conclusions as to how to interpret section 1806A, the reasons therefor, and the manner in which it applies to the facts in this case.[8]

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[8] We note that the Poets also argue that NL Range did not satisfy the requirements for nonrenewable water supply in DCZR sections 1806A.01.4-.7 and 1810A.22. The former section requires, in

VI. Disposition

¶ 56 The judgment is affirmed in part and reversed in part, and the case is remanded to the district court to return the matter to the BOCC for further proceedings consistent with the views expressed in this opinion. On remand, the BOCC may, in its discretion, consider additional evidence.

JUDGE DUNN and JUDGE HARRIS concur.

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connection with a proposal for nonrenewable water service, a water plan; the latter section defines extensively what should be included in a water plan.

NL Range submitted extensive documentation related to its proposed partial reliance on the Property's nonrenewable groundwater. That documentation included a water plan.

Significantly, the Poets did not raise any concern before the BOCC about the adequacy of the water plan or documentation related thereto; nor did they raise it before the district court, except belatedly in a reply brief and at oral argument; and the district court did not address this matter in its order. Under these circumstances, the issue is, then, unpreserved for review. *See Wolf Creek Ski Corp. v. Bd. of Cnty. Comm'rs*, 170 P.3d 821, 831 (Colo. App. 2007) (recognizing that a court reviewing an administrative ruling or decision generally may not consider arguments or issues not raised at the administrative level); *see also Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722, 727 (Colo. App. 1998) (holding that arguments raised for the first time in a reply brief before the trial court and for which the trial court made no findings or conclusions are not properly before the appellate court).

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
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: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Ste. 2009 Castle Rock, Colorado 80109 720-437-6200	DATE FILED: November 7, 2022 6:40 PM CASE NUMBER: 2022CV30015
SUSAN POET and RANDALL POET, Individuals, and SUSAN POET LLC, a Colorado Limited Liability Company, Plaintiffs, v. THE BOARD OF COUNTY COMMISSIONERS of DOUGLAS COUNTY, COLORADO, a political subdivision of the State of Colorado (including all the individual Commissioners in their official capacity, Chair Abe Laydon, George Teal, and Lora Thomas), COTTREL FARMS, LLC, a Utah Limited Liability Company and NL RANGE, LLC, a Colorado Limited Liability Company, Defendants.	**COURT USE ONLY** Case Number: 22CV30015 Division: 5

ORDER RE: PLAINTIFFS' C.R.C.P. 106(a)(4) PETITION FOR REVIEW

THIS MATTER comes before the Court on the C.R.C.P. 106(a)(4) petition for review filed by Susan Poet, Randall Poet, and Susan Poet LLC (hereafter collectively "Poets"). Following the filing of the record and the resolution of a preliminary issue regarding remand, the Poets filed an opening brief. The Douglas County Board of County Commissioners (hereafter "BOCC") and NL Range, LLC (hereafter "NLR") each filed answer briefs. Defendant Cottrel Farms, LLC (hereafter "Cottrel") filed a notice of joinder in NLR's brief. The Court, having reviewed the parties' filings, the record, the case file, pertinent law, and being fully advised, hereby finds and orders as follows:

I. STANDARD OF REVIEW

The Court may review the decision of a local governmental body exercising judicial or quasi-judicial functions to determine whether that entity exceeded its jurisdiction or abused its discretion. C.R.C.P. 106(a)(4); *Hajek v. Bd. of Cty. Comm'rs for Boulder Cty.*, 461 P.3d 665, 668 (Colo. App. 2020). When conducting a review pursuant to C.R.C.P. 106(a)(4), the Court applies a deferential standard, and "may not disturb the governmental body's decision absent a clear abuse of discretion." *Langer v. Bd. of Commissioners of Larimer Cty.*, 462 P.3d 59, 62 (Colo. 2020). A governmental body "abuses its discretion only when it applies an erroneous legal standard," such as by misinterpreting or misapplying the law, "or when no competent evidence in the record supports its ultimate decision." *Id*. The Court is not tasked with determining whether the government chose the "best" option or whether the Court, ruling in the first instance, would have denied approval or adopted a different plan based on the existing record. *See In re Colorado Indep. Legislative Redistricting Comm'n*, 513 P.3d 352, 357 (Colo. 2021).

A governmental body's interpretation of a local code is reviewed de novo, and the reviewing Court applies traditional rules of statutory construction, including giving provisions their ordinary and common-sense meaning. *Colorado Health Consultants v. City & Cty. of Denver through Dep't of Excise & Licenses*, 429 P.3d 115, 121 (Colo. App. 2018). While interpretation of a code is reviewed de novo, interpretations of the code by the governmental entity charged with administering it deserves deference if they are consistent with the drafter's overall intent. *Whitelaw v. Denver City Council*, 405 P.3d 433, 438 (Colo. App. 2017)(citing *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2017)).

There is no general requirement that a government body "make express findings to support its ultimate determinations." *In re Colorado Indep. Legislative Redistricting Comm'n*, 513 P.3d at 361. No competent evidence exists in a record subject to judicial review only when the decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Langer*, 462 P.3d at 62 (quoting *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008)). In performing a review, the Court does not weigh the evidence. *No Laporte Gravel Corp. v. Bd. of Cty. Commissioners of Larimer Cty.*, 507 P.3d 1053,1060 (Colo. App. 2022). Nor does it substitute its judgment for that of the governmental entity. *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008). "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." *No Laporte Gravel Corp.*, 507 P.3d at 1060 (quoting *Khelik v. City & Cnty. of Denver*, 411 P.3d 1020 (Colo. App. 2016)).

The Court presumes the governmental body intended a just and reasonable result. *Steamboat Springs Rental & Leasing, Inc. v. City & Cty. of Denver*, 15 P.3d 785, 787 (Colo. App. 2000). "The burden is on the party challenging an administrative agency's action to overcome the presumption that the agency's acts were proper." *City and Cnty. of Denver v. Bd. of Adj.*, 55 P.3d 252, 254 (Colo. App. 2002). The challenging party must also establish prejudice. *No Laporte Gravel Corp.*, 507 P.3d at 1071. Remand is required only when the governmental body's mistake affected the outcome of the proceedings. *Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 360 P.3d 186, 197 (Colo. App. 2015).

II. STATEMENT OF THE CASE

Defendant Cottrel owns property in Douglas County that was zoned Agricultural One (A-1) and Rural Residential (RR). Defendant NLR is a developer who wants to develop the property to include the construction of over 500 new residences. Such a development requires a rezoning to PD-Planned Development District. The BOCC approved that rezoning request on December 14, 2021. Poets are landowners whose property adjoins that of the proposed development and who object to the BOCC's decision.

III. DISCUSSION

A. Adequacy of Water Supply

Poets assert the BOCC abused its discretion by approving the rezoning without any competent evidence that the necessary water rights to support the proposed development had been

obtained. NLR argues the BOCC reasonably determined that its rezoning application accounted for a sufficient water supply, that it provided sufficient documentation of that supply to comply with the Douglas County Zoning Resolution (hereafter "DCZR") Section 1806A.01, and that Sections 1806A.02 and 1505.08 do not apply to its application. The BOCC concurs that the application satisfied the water criteria and inclusion of the development in an existing district was not required. Poets argue the Defendants' interpretation of the applicable water supply documentation standard is wrong and, even under their proposed standard, the application failed to satisfy the DCZR.

NLR observes that rezoning is the first part of a multi-part process in the creation of a subdivision and not all of the DCZR Section 18A requirements apply to a rezoning application. It contends that Poets incorrectly seek to impose many later stage subdivision and preliminary plat requirements on the rezoning application.

Both Douglas County and the State of Colorado have an interest in the regulation of county land use. Both are concerned with the adequacy of water for new developments. In the "Local Government Land Use Control Enabling Act"[1] the Colorado General Assembly has stated that:

> [W]hile land use and development approval decisions are matters of local concern, the enactment of this part 3, to help ensure the adequacy of water for new developments, is a matter of statewide concern and necessary for the preservation of public health, safety, and welfare and the environment in Colorado. *§29-20-301(1)(b).*

The legislature goes on to mandate:

> A local government shall not approve an application for a development permit unless it determines in its sole discretion, after considering the application and all of the information provided, that the applicant has satisfactorily demonstrated that the proposed water supply will be adequate. A local government shall make such determination only once during the development approval process unless the water demands or supply of the specific project for which the development permit is sought are materially changed. A local government shall have the discretion to determine the stage in the development permit approval process at which such determination is made. *§29-20-303(1).*

"Development permit" is defined as:

> [A]ny preliminary or final approval of an application for rezoning, planned unit development, conditional or special use permit, subdivision, development or site plan, or similar application for new construction; except that, solely for purpose of part 3 of this article: (a) Each application included in the definition of development permit constitutes a stage in the development approval process; and (b) "Development permit" is limited to

[1] §29-20-101, et seq., C.R.S.

> an application regarding a specific project that includes new water use in an amount more than that used by fifty single-family equivalents, or fewer as determined by local government. *§29-20-103(1).*

As recognized by the legislature, a new development goes through stages and while determination of the adequacy of the water supply for such a development must occur and must comply with state requirements, "the local government has the discretion to determine the stage of the development approval process" at which that determination is made.

The creation of a new planned development, such as the one proposed here by NLR, involves both a rezoning of the land on which the development will be located and approval of the proposed subdivision itself. Zoning and subdivision regulations are separate and distinct and serve different purposes. *Shoptaugh v. Board of Cnty. Com'rs of El Paso Cnty.*, 543 P.2d 524, 526-27, 37 Colo.App. 39, 41 (1975) (citing *Smith v. Township Committee*, 101 N.J.Super. 271, 244 A.2d 145, 150).

State law requires counties to adopt subdivision regulations. *§30-28-133(1).* The subdivision regulations adopted by a county's board of commissioners must require that those seeking approval for construction of a subdivision submit a variety of items to the commissioners including:

> Adequate evidence of a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed. *§30-28-133(3)(d).*

Douglas County has adopted a subdivision resolution (hereafter "DCSR"). This resolution states:

> Subdivision of land is controlled by Douglas County pursuant to Section 30-28-101, et seq., C.R.S. and this Resolution. All subdivision approvals shall be in conformance with the Master Plan, Zoning Resolution and approved and recorded Planned Development Plans where property is zoned Planned Development. *DCSR, Art. 102.2.*

This provision recognizes that in the stages of the development approval process subdivision consideration for a Planned Development cannot occur until the proper zoning reclassification has taken place. The DCSR goes on to provide:

> Land proposed for a subdivision shall not be approved until the necessary provisions have been made for subdivision design, access, parks, trails, recreation and opens spaces, schools, drainage, ***water***, wastewater disposal, traffic controls, road improvements, police and fire protection or other reasonably necessary improvements and services. The cost and installation of such improvements, which primarily benefit the land being subdivided, shall be borne by the owners or developers of such land. (Emphasis supplied). *DCSR, Art.* 102.6.

The DCSR then sets out an application process which includes a preliminary plan and a final plat both of which must be approved by the BOCC. *DCSR*, Art. 201. Both the preliminary plan and final plat involve the submission of an application, an application fee, required plans and reports, referrals of the proposal to other agencies, staff analysis and public hearings/meetings. *Id.* "Approval at any step in the process does not ensure approval at the next step." *Id.* Preliminary plan approval requires conformity with Section 18A, Water Supply-Overlay District, of the Zoning Resolution. *DCSR, Art*. 403.03. Final plat approval also requires that it conforms with Section 18A, Water Supply-Overlay District, of the Zoning Resolution. *DCSR Art.* 503.03.

Rezoning is an initial stage in this developmental approval process. State law leaves to the county's discretion the stage of the developmental approval process at which the applicant/developer must demonstrate the proposed water supply will be adequate. While Section 18A of the DCZR has application to rezoning, the county has chosen to make the decision as to the adequacy of water for a new development at the preliminary plan stage of the subdivision approval process. Section 1802A provides in part:

> "Unless otherwise appealed in section 1808A, the Board *shall determine the adequacy of a water supply to meet the demand for a proposed development within a Preliminary Plan,* Minor Development or Use by Special Review application as applicable." (Emphasis supplied).

As noted, Section 18A does have a role in the rezoning process. The county has adopted requirements applicable to obtaining a rezoning. It is not necessary at the rezoning stage to provide the same proof of the adequacy of the water supply that is required at the latter stage of the process. Nevertheless, standards must be met.

Section 15 of the Douglas County Zoning Resolution (hereafter "DCZR") provides for the creation of Planned Development Districts in Douglas County. The rezoning submittal process to change zoning to Planned Development is set out in Subsection 1505. After describing numerous events that must occur in this process, subsection 1505.09 provides that:

> The Board [BOCC] shall evaluate the rezoning request, staff report, referral agency comments, applicant responses, the Planning Commission recommendation, and public comment and testimony, and shall approve, approve with conditions, continue, table for further study, remand to the Planning Commission, or deny the rezoning request. The Board's action shall be based on the evidence presented, compliance with the adopted County standards, regulations, policies and other guidelines.

Subsection 1503 is entitled "Approval Criteria for Planned Development Rezoning" and it sets forth ten criteria prefaced by the statement:

> The following criteria shall be considered by the Planning Commission and Board in the review of planned development rezoning applications…

The tenth of those criteria for the Board to consider in its review is:

> [W]hether the application is in conformance with Section 18A, Water Supply-Overlay District, herein.

While the water supply is a factor to be considered in a planned development rezoning request, when considering rezoning the Board is simply called upon to consider, as one of the criteria in their decision, whether the application conforms with section 18A of the Water Supply-Overlay District. However, for the BOCC to approve a preliminary plan or a final plat it is required to make a specific finding that the plan and plat conform with Section 18A.

Section 1803A sets forth approval standard for the BOCC to utilize when evaluating land use applications and are clearly applicable when determining the adequacy of a water supply at the preliminary plan stage of a new subdivision. These standards include a determination of the sufficiency of the "water plan" which is described in extensive detail in section 1810A.22. The water plan includes, for example, proof that the water supply is owned by the applicant, proof that may not be available because of cost of acquisition, until the project becomes feasible following the approval of rezoning.

As these approval standards apply to land use applications, they have some impact on rezoning decisions. Section 1806A sets forth documentation standards on which the BOCC is to base a determination as to whether the approval standards have been met. These documentation standards differ in detail for rezoning, preliminary plans and final plats. There is a set of standards "for individual applicants and non-District entities," 1806A.01, and one for "District entities," 1806A.02. The parties disagree as to which category is applicable here.

The category is important because Poets assert that if 1806A.02 applies then the BOCC's approval of rezoning was an abuse of discretion, because all parties admit that there is no evidence in the record to satisfy those requirements. Alternatively, Poets argue that if the BOCC determined that the requirements of 1806A.01 applied, then the board misinterpreted the DCZR.

The court agrees with the Defendants that the BOCC determined that 1806A.01 applied. Although the board did not make a specific finding to that effect, they were advised that the requirements of 1806A.02 had not been met and, therefore, by approving the rezoning request, they implicitly determined that the requirements of 1806A.01 were applicable and had been complied with. Generally, express factual findings are not a prerequisite to a valid decision by an administrative board if the necessary findings may be implied from the action taken. *Sundance Hills Homeowners Ass'n v. Bd. of County Comm'rs*, 188 Colo. 321, 534 P.2d 1212 (1975).

The questions then remain whether the applicants fit the 1806A.01 category and whether the requirements of that category were met. The court answers both questions affirmatively.

The court observes that the distinction between the two categories of documentation standards in the DCZR, 1806A.01 and 1806A.02, is not a model of clarity. Category .01 entitled

"For individual applicants and non-District entities" appears to focus on the nature of the applicant, whereas .02 entitled "For District entities" appears to focus on the nature of the water provider, since, generally speaking, a District would not be an applicant. Harmonizing these provisions, however, involves recognizing that both actually focus on the proposed source of the water. The term "District" is defined in the DCZR.[2] It contemplates an entity currently in existence and that is presently providing water services, and which will be responsible for the delivery of its services to the proposed development. There is no distinction made in section .02 between renewable water and non-renewable water. A District has water and is able or unable to extend its services to a given project. In section .01, on the other hand, there is a provision for both renewable and non-renewable water.

NLR proposed meeting its water demands through a combination of renewable and nonrenewable water supplies as recognized and summarized by Matt Jakubowski[3] of the county staff at the December 14, 2021, BOCC hearing. Additionally, the intention to create a new Title 32 special district to provide water and sewer services was also discussed at that hearing and summarized by Jill Reppell of Cornerstone Insight on behalf of Defendant Cottrel. The exclusive source of water was not an existing District[4] as provided for in section .02. Instead, water would be supplied by a combination of renewable and non-renewable water and a yet to be created special district to handle implementation, as addressed in.01.

It was appropriate, therefore, for the BOCC to utilize the documentation standards in 1806A.01. Those standards, however, still contained requirements that needed to be met. With respect to renewable water, "the applicant shall submit a letter stating the intent to obtain renewable water rights or a copy of the conditional water right(s) as decreed by the court." 1806A.01.1. With respect to non-renewable water, the applicant is permitted to submit several kinds of verification including a water plan. 1806A.01.7.

As to renewable water, NLR submitted a letter of intent from the City of Englewood to lease 200 acre-feet of raw water for NLR's Range Planned Development. While being a seller of water to the project, the City of Englewood did not propose to be the service provider as contemplated under 1806A.02.

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[2] Sec. 1810A.06 provides, "District: A special district currently offering water service, organized or validated pursuant to the special district Act, §32-1-101, et seq., C.R.S.; or a non-specified governmental entity including, but not limited to municipalities, authorities, and public improvement districts, as well as private water companies.

[3] Chief Planner of Douglas County Department of Community Development Planning Services Division.

[4] Poets suggest that NLR's rezoning submittal was inadequate because there was no proof of the planned development's inclusion in an Existing District at least 21 days prior to the BOCC hearing.

Section 1505.08 of the Rezoning Submittal Process provides that, "For applications that propose a water supply from an Existing District, at least 21 days prior to the Board hearing, the applicant shall submit evidence of inclusion of the property into the Existing District. An inclusion agreement may be contingent on approval of the rezoning by the Board." "Existing District" is defined by 1810A.09 as, "A special district currently offering water service, organized or validated pursuant to the Special District Act, §32-1-101, et seq., C.R.S. with a service plan or statement of purposes approved by Douglas County prior to August 12, 1998." Even if 1505.08 is read as referring to any portion of a planned development's water supply, it would not be applicable because the renewable water portion of this project was to come from the City of Englewood, to which the definition of Existing District did not apply. There was, therefore, no need for an inclusion agreement.

As to the nonrenewable water, a water plan had been submitted by NLR for some 242.2-acre feet according to Matt Jakubowski at the December 2021 hearing. Jakubowski noted that this included the submission of a declaration of restrictive covenants, for the BOCC to execute, to reserve water underneath the property. He concluded that, when considered together, the renewable and nonrenewable water supplies were sufficient to meet the presumptive demand for the project.

Poets claim Defendants' Letter of Intent from the City of Englewood was insufficient to satisfy the mandatory approval criteria set forth in DCZR Section 1803A because it did not constitute an enforceable contract for water. This argument, however, is premised on the applicability of the 1806A.02 criteria. Section 1806A.01.1 does not require an enforceable contract for water at the rezoning stage. A November 19, 2021 letter from NLR's counsel to Jakubowski stated in relevant part:

> I am writing on behalf of my client, the developer of the Range Planned Development ("Range PD") to provide notice of the developer's intent to obtain renewable water rights pursuant to Douglas County Zoning Resolution 1806A.01.1.
>
> Range PD is negotiating with the City of Englewood to obtain up to 200 a.f. of renewable surface water rights, which is more than the project's water plan indicates is necessary to serve Range PD. Range PD will provide an updated water plan reflecting the renewable water during the Preliminary Plan process pursuant to DCZR 1806A.01.2. Record, p. 8189.

Jakubowski subsequently authored an email on November 22, 2021, which stated in part:

> We received the attached letter from the Range PD applicant. They intend to obtain 200 acre-feet of renewable water from the "City of Englewood." They have cited Sec. 1806A.01.1 (an individual applicant or non-District entity can state an intent to obtain renewable water). We agree they can submit such an intent letter since they have not formed a metro district and don't have a contract with Englewood. However, we indicated last week that we would also need a preliminary intent letter and water supply documentation from the provider (in this case Englewood).
>
> Without this documentation, we have concerns about satisfaction of the Sec. 18A approval criteria (and for the rezoning approval criteria). The applicant letter doesn't verify if the water is truly renewable, and we don't have a comparison of Englewood's water supply versus Range's demand. Record, pg. 8187.

The Court reads this email as a request for more information. There is no reference to section 1806A.02. It acknowledges that applicants are proceeding under section 1806A.01 without

disagreement and does not suggest that "NL Range also needed to satisfy 1806A.02's requirements because the renewable water supply was coming from a District" as Poets assert in their Reply Brief. The additional information the county desired was then forthcoming in Englewood's Letter of Intent dated November 24, 2021. Record, p. 8201.

At the December 14, 2021, hearing Jakubowski stated:

> If the board concurs that this Section 1806A.01 documentation standards are appropriate for this proposal, the applicant has submitted sufficient information to comply with Standards 1803A.01 and .02 as shown on the screen. In that case, a water supply report and the other details provided in the staff report would be provided by the applicant at the preliminary plan stage of the subdivision process.

Commissioner Laydon made a motion "to approve the range plan development rezoning with the two conditions as presented[5]." *BOCC Hearing Transcript (December 14, 2021)*, p.74. He also indicated that he believed that the approval standards contained in DCZR section 1503 had been met. *Id*. at p. 75. Speaking in favor of the motion, Commissioner Teal stated:

> I think we're in the approval standards. You know, listen, I think there's a bunch of work that needs to be done for final plat in order to come in line with 18A. Obviously, the applicant has agreed to the conditions, has agreed to make and follow through in that commitment to work through those details to go to final plat.
>
> And I also very much have an appreciation for the sequencing -- the sequencing of these sorts of developments. For where we are right now, I think it's sufficient. I look forward to seeing those details coming forward from the applicant to move forward to final plat. But, you know, standards there will be -- as we've heard the applicant state, will be far more detail-oriented than they are now. So, I look forward to seeing that work done and moving forward. *Id*. at 75-76.

Following these comments, voting took place and the motion carried.

The court does not find that the BOCC abused its discretion or misinterpreted the DCZR by its decision to rezone based on the requirements regarding water supply at this stage of the planned development approval process.

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[5] "Condition Number 1, prior to recordation, all minor and technical corrections will be made to the plan document to the satisfaction of Douglas County.
Condition Number 2, all commitments and promises made by the applicant or the applicant's representative during the public hearing and/or agreed to in writing and included in the public record have been relied upon by the Board of County Commissioners in approving the application. Therefore, such approval is conditioned upon the applicant's full satisfaction of such commitments and promises." Pp. 23-34

B. Adequacy of Sewer Infrastructure

Poets claim the BOCC abused its discretion by approving rezoning without evidence that the project would be supported by the necessary sanitary sewer infrastructure, and that the two communications submitted to cure a deficiency identified by county staff were insufficient. The BOCC maintains that the sanitary sewer criteria were met and NLR agrees. Poets argue that Defendants' interpretation of what constitutes "documentation of the physical and legal capacity to provide sanitation" is nonsensical.

DCZR Section 1503.04 states that in review of planned development rezoning applications, the Planning Commission and the BOCC shall consider "whether the application demonstrates public facilities and services necessary to accommodate the proposed development will be available concurrently with the impacts of such development."

At the December 12, 2021, BOCC hearing, in reviewing approval criteria Mr. Jakubowski stated:

> Approval Criteria 1503.04 requires demonstration of the availability of public services. The applicant provided correspondence just within the last couple of days. You received a packet of information regarding water -- water and sewer documentation on Friday.
>
> An additional document that I'd like to enter into the record discusses the applicant's proposal to send sewer to the South Platte Renew facility, which is owned in partnership by the City of Englewood and the City of Littleton. So that would provide sewer treatment to range.
>
> If the PD is approved, additional detail regarding how sewer service will be provided to the project will be necessary at subdivision.

The documents referenced are a December 8, 2021, letter by NL Range Manager Darwin Horan and a December 13, 2021, email between Pieter Van Ry, Director of South Platte Renew & City of Englewood Utilities, and Jill Repella. The December 8, 2021, letter states:

> I am writing to you on behalf of NL Range, LLC, ("NL Range") which is the applicant regarding the pending Range PD described above. Specifically, I am writing to address the documentation requirement concern sanitary sewer service for the Range PD pursuant to Section 1503.04 of the DCZR.
>
> In this regard, please be advised that NL Range intends to provide central sanitary sewer service for the Range PD. It is anticipated that

> contractual arrangements for such service will be undertaken and completed in conjunction with obtaining contractual commitments regarding central water service for the development. The intent is for a Title 32 District to provide service, either through an inclusion agreement or an IGA. Confirmation of the provider of sanitary sewer service as well as the identification of related facilities, treatment capacities and service contracts will be provided at the preliminary plan application stage of the subdivision platting process for the Range PD. Please advise me or Ms. Jill Repella (303-807-7087, or Jill@jillrepella.com) if you have any questions concerning this matter, Thank you.

The December 13, 2021, email by Pieter Van Ry provides:

> The South Platte Renew (SPR) facility has adequate capacity for the projected sewer treatment needs of the NL Range development. SPR is co-owned by the City of Englewood and the City of Littleton. NL Range understands conveyance to SPR will need to be established through agreement with one of the two owner cities.

During the December 14, 2021, hearing Ms. Repella stated:

> So we anticipate and plan on central water and sewer services through a future Title 32 District.
> […]
> Sewer. You received a letter. I believe you've seen it now. We have a couple plans for sewer. One option is the Platte Renew. Platte Renew is owned by Littleton and Englewood. As we go through our process in working on the contract for the water -- typically, water and sewer contracts are negotiated and finalized together. We will embark on that process with Platte Renew.
> But we also have done a study that I have here, but it's not ripe for providing to the County yet. And we will go into detail when we narrow that down. We have other alternatives for sewer that we are exploring. I know that -- and then that are viable.
> […]
> We have many options available to us in sewer. And we would provide more detail in that at subdivision preliminary plan as we go through the contracts for the renewable water supplies.
> .

As discussed above, a subdivider must first obtain rezoning and then must comply with the state and county subdivision regulations. *Shoptaugh*, 543 P.2d at 524, 526, 37 Colo.App. at 39, 41. Under DCZR Section 1506.10 "documentation of the physical and legal capability to provide sanitation" is listed as a general submittal requirement for a rezoning application. Documentation was provided here, although not the final documentation that would ultimately be required at later

stages of the subdivision approval process. Section 30-28-133, C.R.S., addresses mandatory requirements that must be met before preliminary and final subdivision plats can be approved. Pursuant to C.R.S. § 30-28-133:

> (6) No board of county commissioners shall approve any preliminary plan or final plat for any subdivision located within the county unless the subdivider has provided the following materials as part *of the preliminary plan or final plat subdivision submission*:
>
> …
>
> (b) Evidence to establish that, if a public sewage disposal system is proposed, provision has been made for such system and, if other methods of sewage disposal are proposed, evidence that such systems will comply with state and local laws and regulations which are in effect at the time of submission of the preliminary plan or final plat. (Emphasis supplied).

In *Sundance Hills Homeowners Ass'n v. Board of Cnty. Com'rs for Arapahoe Cnty.*, the Colorado Supreme Court held that the district court erred in finding that because adequate sewage facilities were unavailable at the time a rezoning was approved, such deficiency was fatally defective to that rezoning:

> The Resolution requires that before any building begins, the developer must comply with certain Arapahoe County subdivision regulations. These regulations contain multi-level checks and balances to assure that any development will be in the best interest of the public. It is at that point that the availability of adequate sewage facilities must be finally resolved, not at the rezoning state. 534 P.2d 1212, 1215, 188 Colo. 321, 327 (Colo. 1975).

Although final provisions for sewage disposal were not in place, there was evidence from which the BOCC could find Defendants had demonstrated that public facilities and services necessary to accommodate the proposed development were available. This court does not find that the BOCC abused its discretion or misinterpreted the DCZR by its decision to rezone based on the requirements regarding the capacity to provide sanitation at this stage of the planned development approval process.

C. Modified Zoning Application

Poets allege the BOCC violated the DCZR by approving the rezoning without requiring the changed proposal to undergo agency referral, agency comment and further review by the Douglas County Planning Commission. Poets assert the applicants did not formally revise their rezoning application to state that the proposed development would rely upon water from

Englewood until more than three months after the Planning Commission made its recommendation to the BOCC and they never identified a substitute service provider for sanitary sewer service and infrastructure. Poets claim the lateness of the changes severely limited the public's ability to understand and provide comments on the proposal. NLR argues the BOCC properly considered its application with the changes. The BOCC concurs that the county's process was fully and correctly followed.

When, as here, an agency acts in a quasi-judicial capacity, procedural due process requires that the agency give notice and afford an opportunity for a meaningful hearing to affected individuals. *Lobato v. Indus. Claim Appeals Office*, 105 P.3d 220 (Colo.2005); *Douglas County Bd. of Comm'rs v. Pub. Utils. Comm'n*, 829 P.2d 1303 (Colo.1992); *Canyon Area Residents for the Environment v. Board of Cnty. Com'rs of Jefferson Cnty.*, 172 P.3d 905, 907 (Colo.App.,2006). Although administrative proceedings need not strictly comply with the rules of procedure and evidence, *Monte Vista Prof'l Bldg., Inc. v. City of Monte Vista*, 35 Colo.App. 235, 531 P.2d 400 (1975), the principle of fundamental fairness must be observed in zoning proceedings. *Nat'l Heritage, Inc. v. Pritza*, 728 P.2d 737 (Colo.App.1986); *Monte Vista Prof'l Bldg., Inc. v. City of Monte Vista*, supra. "[T]he hearing process must be conducted in an atmosphere evidencing fairness in the adjudication of matters before [a board]." *Sclavenitis v. City of Cherry Hills Vill. Bd. of Adjustment & Appeals*, 751 P.2d 661, 663 (Colo.App.1988).

DCZR section 1505.09 states:

> The Board shall evaluate the rezoning request, staff report, referral agency comments, applicant responses, the Planning Commission recommendation, and public comment and testimony, and shall approve, approve with conditions, continue, table for further study, remand to the Planning Commission, or deny the rezoning request. The Board's action shall be based on the evidence presented, compliance with the adopted County standards, regulations, policies, and other guidelines.

Unlike the provisions contained in the Jefferson County Zoning Regulations that were addressed in *Canyon Area Residents for the Environment*, *supra*, there are no requirements in the DCZR that set a time frame on substantial revisions to a rezoning application or supporting documents.[6]

The DCZR rezoning submittal process provides for staff of the Planning Services Division to send copies of a completed application to referral agencies and for the potential receipt of comments from those agencies. §§1505.02 & 1505.04. That occurred here. The rule also provides for the rezoning applicant to address the comments of the referral agencies and to "identify in writing the extent to which the project has been revised in response to the comments." §1505.04. There is no requirement, however, for resubmittal of any revisions made by the applicant to the

[6] The Court of Appeals determined in Canyon *Area Residents for the Environment* that the Jefferson County regulation did not allow substantial changes to the zoning application in response to the BOCC's request after public hearings had closed as this deprived the public of an opportunity to comment. There is not a comparable provision in the DCZR, but additionally the revisions to the original application that occurred here were presented prior to the close of the public hearing and the BOCC vote, thereby lessening any procedural due process concerns.

referral agencies for further comment. Instead of approving or denying a revised zoning application, clearly the BOCC may "continue, table for further study, remand to the Planning Commission," if it chooses, but it is not required to do so.

As discussed above, water and sewage concerns are to be addressed in more detail at the preliminary plan and final plat stages of a planned development. Additionally, further referral and input from other agencies is required by statute at those stages. See §30-28-136(1).

The court does not find that the BOCC abused its discretion or misinterpreted the DCZR by its decision to rezone without further referrals and comments or additional review by the Planning Commission.

D. Inconsistency with the County Master Plan

Poets assert the BOCC abused its discretion by approving the rezoning in contravention of the Douglas County Comprehensive Master Plan (hereafter "DCMP"). NLR argues the BOCC did not abuse its discretion or exceed its authority in finding that the rezoning complied with the DCMP. The BOCC asserts that with the level of discretion afforded to the BOCC for this criterion, it's decision must be upheld.

C.R.S. § 30-28-106(3)(a) provides:

> The master plan of a county or region is an advisory document to guide land development decisions; however, the plan or any part thereof may be made binding by inclusion in the county's or region's adopted subdivision, zoning, platting, planned unit development, or other similar land development regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes as appropriate.

In *Board of Cnty. Com'rs of Larimer Cnty. v. Conder*, the issue was presented of "whether a county can adopt a requirement in its subdivision regulations that subdivision proposals comply with the county's master plan provisions, and then rely upon non-compliance with master plan provisions in denying a subdivision application" the Colorado Supreme Court held:

> that although master plans are generally only advisory documents, a county has the authority to require master plan compliance when a county includes a master plan compliance provision in its legislatively adopted subdivision regulations. However, in requiring master plan compliance, the master plan provisions at issue must be drafted with sufficient exactitude so that proponents of 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. 927 P.2d 1339, 1340, 1350–51 (Colo.1996).

The DCMP states in part:

> The CMP has been developed as the foundation for the County's future growth and development, and as such, is intended to provide decision makers with guidance on how to maintain and improve identified community values.
> […]
> The CMP is the instrument that establishes long-range land use policies in a coordinated and unified manner. Decision makers can use this Plan for guidance on resource allocation, zoning of land, the subdivision of land, capital improvement plans, budgeting, and County work programs.
> […]
> INTERPRETATION: HOW THE SECTIONS RELATE TO EACH OTHER
> As a guiding document, the CMP uses language different than that found in regulatory documents such as the zoning resolution and the subdivision resolution. Words like "encourage," "support," "promote," and "ensure" provide flexibility in prioritizing the competing values in the CMP and remind us that the document is not a checklist. *DCMP*, p.1-9.

In section 124, entitled "Interpretation," the DCZR states in part:

> While the approval criteria for many land use applications defined herein require "compliance with," "consistency with," or "general conformance with" the Comprehensive Master Plan (CMP) or the goals, objectives, and policies of the CMP, the individual goal, objectives, and policies are not, themselves, approval criteria. The Board will consider the diversity of community value, applicable laws and regulations, private property rights, and unique characteristics of each application when balancing the goals, objective and policies set forth in the CMP. A property's designation on the CMP Land Use Map is the primary basis for establishing future use and density.[7] DCZR, §124.

Poets contend that DCZR Section 1503.01 mandates that rezoning cannot be approved unless the application complies with the requirements of the DCMP. As noted above, however, Section 1502 does not set out mandatory requirements that must be fulfilled, but factors that the BOCC is to consider in reviewing planned development rezoning applications. One of these criteria is whether the application complies with the requirements of the DCMP. Making that determination contemplates the exercise of discretion by the BOCC that is consistent with

[7] As noted in NLR's answer brief, there is apparently no dispute that the Range property is designated within the CMP Land Use Map 1.1 as being within the "Louviers Rural Community." A separate map displays "Nonurban Subareas" and Louviers and the Range Property are not included in these areas.

interpreting the DCMP to allow flexibility in prioritizing its competing values, as opposed to acting as a checklist.

On August 23, 2021, the Douglas County Planning Commission decided unanimously that the planned development was consistent with the DCMP, despite concerns that were expressed. As stated in the BOCC response brief, there was competing evidence regarding compliance with the DCMP presented both orally at the BOCC hearing and in written submissions. At the conclusion of the hearing Commissioner Teal spoke in favor of the motion commenting that, "I'm very, very aware of where things do stand in the surrounding areas. And I do accept the fact that this isn't just singular development in an area. This is a development that actually does have impact off the property as well as on the property." *BOCC Hearing Transcript (Dec. 14. 2021)* at pg. 76. Commissioner Thomas noted, "That this is a difficult area to develop in, and otherwise it would have been developed a long time ago." Finally observing that the proposal, "has the ability to significantly improve the area for lots of different reasons." *Id.*

Ultimately it is for the BOCC to weigh the evidence, and the court does not substitute its judgment for that of the BOCC with respect to that process. The Court finds that it was within the BOCC's discretion to determine whether the proposed development was consistent with the DCMP, and the BOCC did not abuse its discretion nor misinterpret the DCZR in determining that the rezoning should be granted.

E. 1041 Permit Requirement

Poets claim the BOCC abused its discretion by approving the rezoning despite NLR never having sought nor obtained a "1041 permit." They state that because the planned development involves a new "Urbanized Grown Center" within a "Non-Urban Area," a 1041 permit was required.

Section 103 of the Douglas County Areas and Activities Designated Matters of State Interest Regulations (1041 Regulations), titled "Designation and Applicability" states:

> The following activities or areas are hereby designated Matters of State Interest requiring permit approval from the Board of County Commissioners of Douglas County (BCC) pursuant to these regulations and prior to development of any of the following activities.

The list of activities requiring permits that follows this provision includes:

> Any application to Douglas County for rezoning, for the purpose of establishing an Urbanized Growth Center when located within the non-urban area identified on the Douglas County Comprehensive Master Plan Land Use Map, as amended. §103.04.2.

"Urbanized Growth Center" is defined in 1041 regulations as:

> Any residential development with a gross density greater than one (1) dwelling unit per 2.5 acres and more than 250 total dwelling units; or any commercial, business, office or industrial development.

As noted above (fn. 7), the location of the proposed development is not within a non-urban area as depicted on the CMP land use map. Poets suggest that because it is described as a "Rural Community" it fits within the category of a non-urban area. Their support for this contention is a description of Rural Communities contained in the DCMP which states a reason for including this and other rural communities on the land use map is, "to draw attention to the desire of these rural village residents to preserve their heritage as unique entities within the County's nonurban area." *DCMP*, page p.4-1.

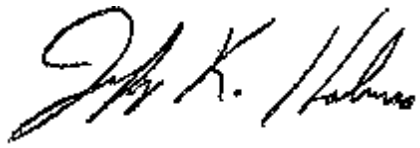
The court finds this is a descriptive passage designed to give expression to the attitude of residents and introduce more detailed discussion of certain historic communities in Douglas County, but not to provide a guiding definition. Later in the DCMP, in a specific discussion of the Louviers Rural Community, the document reads, "The Louviers Rural Community is characterized by a mix of urban and rural land uses." *DCMP*., p. 4-11.

The planning commission unanimously recommended NLR's application for approval without a 1041 permit and the BOCC approved the rezoning without one. Their decision that the non-urban characterization did not apply is entitled to deference. Even if the planned development fits within the description of an "urbanized growth center" it is not within a non-urban area as depicted on the DCMP land use map. The court finds that the BOCC did not misinterpret the regulations or abuse its discretion by not requiring a 1041 permit before approving the requested rezoning.

IV. CONCLUSION

The rezoning decision of the Douglas County Board of County Commissioners is AFFIRMED.

DONE AND SIGNED this 7th day of November 2022.



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Jeffrey K. Holmes, District Court Judge