

DISTRICT COURT, PARK COUNTY, COLORADO  
300 Fourth Street  
P.O. Box 190  
Fairplay, CO 80440

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CASE NUMBER: 2017CV30073

**Plaintiffs:**

SAVE SOUTH PARK, INC., a Colorado non-profit corporation; and KIMBERLY DUFTY; MARK FISHER and WENDY BRADSHAW; PAM and TOM ACKERMAN; ANGELA MAY and RYAN SCHEUERMANN; MATT KAPCHINSKE; WILLIAM and JAMIE MORROW; HOPE LOMBARD; ANN LUKACS; MICHAEL S. LORENZO; PHILIP and AMANDA BURDETTE; KRISTIN and ELLWOOD BARRETT; JEAN and JACK FERENCE; LAURA BATTS; SARAH MEGGISON; KARLEEN DYC; TERRY J and DIANE M. BERRY; DOUG BITTINGER and CINDY REESE; and PETE THAYER and WENDY KERNER, Individuals

v.

**Defendants:**

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK, STATE OF COLORADO, a body corporate and politic; HIGH SPEED AGGREGATE, INC., a Colorado corporation; HIGH SPEED MINING, LLC, a Colorado limited liability company, and LANCE J. BALLER, an individual.

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Case No.: 2017cv030073

Division: B

**PLAINTIFFS' OPENING BRIEF**

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Plaintiffs Kimberly Dufty; Pam Ackerman; Tom Ackerman; William Morrow; Jamie Morrow; Hope Lombard; Kristin Barrett; Ellwood Barrett; Jean Ference; Jack Ference; Laura Batts; Pete Thayer; and Wendy Kerner, (hereinafter collectively referred to as the "Appellant Neighbors"), by and through undersigned counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, hereby submit this Opening Brief:

### **STATEMENT OF THE CASE**

This is a case that began with a brazen zoning violation and ended with the County government blessing that zoning violation through an incomplete and apparently secret process that culminated in unlawful spot zoning. Despite the rezoning applicants' admitted history of zoning violations at the site, Defendant the Park County Board of County Commissioners ("the BOCC") approved Defendants High Speed Aggregate, Inc., High Speed Mining, Inc., and Lance Baller's (collectively, "High Speed") petition to rezone 28-acres from residential to mining (the "Petition"). The initial public hearing on the Petition was continued to a later date. Thereafter, and without any public notice or participation, the BOCC negotiated 11 conditions of approval and, according to the Chairman of the BOCC, reached a "decision" outside of a public meeting. The BOCC then summarily approved the Petition at a public hearing with no deliberation and no public comment on the final proposed resolution.

As to the actual merits of the Petition, the BOCC initially abused its discretion by considering what was an incomplete rezoning petition in violation of County law. This abuse of discretion was further compounded when the BOCC contradicted the recommendations of the Park County Planning Commission and the Park County Planning Department Staff and approved the rezoning of a 28-acre property originally zoned only for residential uses to allow instead, heavy

industrial gold mining at the site. This unlawful spot rezoning was done solely for the benefit of the applicant and to the direct detriment of surrounding land owners. Moreover, this approval ignored the undisputed evidence that the applicant did not meet its required burden to establish by clear and convincing evidence that: (a) mining is compatible with the physical, geological, and environmental conditions at the site; and (b) mining is compatible with the uses at surrounding properties in the immediate vicinity of the site. Ignoring these factors, the BOCC approved the rezoning to support High Speed's continued involvement with a Discovery Channel television program called "Gold Rush."

Ultimately, the Petition was approved without any particularized findings of fact and, as such, the County has not provided this Court with a decision that can be subjected to meaningful appellate review. Consequently, the decision of the BOCC must be reversed.

### **STATEMENT OF JURISDICTION**

This Court's jurisdiction arises under C.R.C.P. 106(a)(4). This case seeks certiorari review of a quasi-judicial decision made by the BOCC to rezone property within Park County. *See Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1976). The Appellant Neighbors challenge the BOCC's abuse of discretion and arbitrary, capricious, and unlawful approval of the rezoning from the Residential Zone District to the Mining Zone District. This Court previously determined that the Appellant Neighbors have standing to pursue this appeal and that C.R.C.P. 106(a)(4) provides the exclusive remedy for resolving this challenge. (Jan. 10, 2018 Findings, Conclusions, and Orders, at pp. 3-4.)

## **STATEMENT OF THE ISSUES**

- I. Whether the BOCC Violated the Colorado Open Meetings Law and/or the Appellant Neighbors' Due Process Rights in Adopting Conditions of Approval in a Non-Public Setting and Without Deliberation.
- II. Whether the BOCC Abused Its Discretion by Approving an Incomplete Rezoning Petition.
- III. Whether the BOCC Engaged in Unlawful Spot Zoning by Rezoning a Small Parcel from Residential to Mining for the Sole Benefit of the Landowner and to the Detriment of Surrounding Land Owners.
- IV. Whether the BOCC Abused Its Discretion in Approving the Petition Despite the Absence of Clear and Convincing Evidence that the Applicant Met All Required Standards of Approval.

## **RELEVANT BACKGROUND**

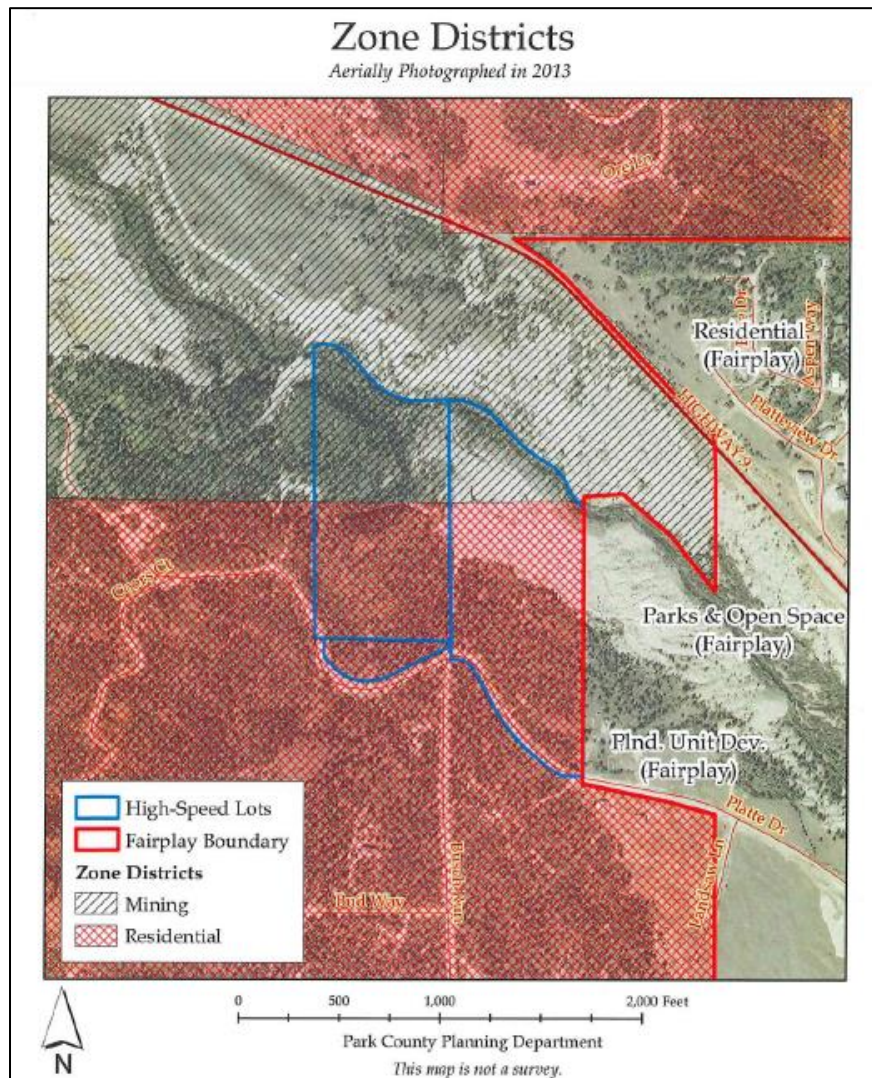
This is a C.R.C.P. 106 appeal of the BOCC's rezoning of a 28-acre property in unincorporated Park County (the "Property"), which at the behest of the applicant, High Speed, changed the zoning at the site from the "Residential Zone District" to the "Mining Zone District." As such, this appeal first requires a discussion of: (i) the Property; (ii) the circumstances that led to the rezoning; (iii) the applicable Park County standard for rezoning; and (iv) the process by which the rezoning Petition was considered and ultimately approved. Each is discussed in turn below.

### **i. The Property**

The 28-acre Property is comprised of one complete parcel and the southern portions of two other parcels located in unincorporated Park County immediately to the west of the Town of Fairplay. (PCR 01315.) Prior to the rezoning, the entirety of the Property was located within the Residential Zone District, with the small parcel located completely within the Residential Zone



District and the two partial parcels included within the Property split between the Residential Zone District in the south (shown in red) and the Mining District in the north:



(PCR 01421.) The Park County zoning map confirms that all of the parcels to the west and south of the Property are within Park County's Residential Zone District. (*Id.*) Similarly, the properties to the east are all located within Fairplay town limits and have been designated as either preserved open space or for use within a planned unit development for a residential neighborhood. (*Id.*) Prior to the rezoning, the only adjacent Mining Zone District was to the north of the Property. (*Id.*)

The materials submitted with High Speed's rezoning Petition disingenuously claim "[t]he neighboring land uses to the east, west, and north [of the Property] are all mining" (PCR 01439) by including the two northern portions of the split parcels within its description of the Property and thus creating the illusion that the Property is surrounded on three sides by mining. In reality, because only the southern portions of the split parcels were to be rezoned, the relevant inquiry relates to the existing uses surrounding the real property that was to be rezoned. (PCR 01421.) Here, the rezoned Property is and was surrounded on three sides by residential and open space uses. (*Id.*) Again, the only adjacent mining to the Property is to the north on land owned and operated by High Speed. (*Id.*)

Prior to the rezoning giving rise to this appeal, the Property was always located in the Residential Zone District dating back to Park County's original zoning map in 1974. (PCR 01316.) The residential status of the Property remained unchanged when Park County again revised its zoning in 1998. (*Id.*) Except for the portion of the Property that was unlawfully used for mining prior to the rezoning (discussed in more detail below), the majority of the Property remains undeveloped forest:



(PCR 01178 (depicting the Property subject to the rezoning Petition within the black lines but south of the red line).) The Staff Report regarding the Petition notes that the proposed mining would result in the removal of trees and threaten to pollute the groundwater supply depending on the depth of any mining. (PCR 01316.) A map prepared by Park County confirms that the "Potential Wildlife Impact" has been rated as "High" for the entirety of the Property. (PCR 01171.)

Under the Park County Land Use Regulations, "[t]he purpose of the Residential Zone District is to provide for residential neighborhoods comprised of detached, single-family dwellings at relatively low density." L.U.R. § 5-304.<sup>1</sup> In contrast, the Mining Zone District was "created for

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<sup>1</sup> The Park County Land Use Regulations ("L.U.R.") may be accessed online at: <https://www.parkco.us/189/Land-Use-Regulations>. The L.U.R. that pertains to Zoning is Article V.

the purpose of protecting lands for the extraction of mineral deposits" and allows as a matter of right on-site processing of mined materials as well as any heavy industrial use that is "mining related." L.U.R. § 5-311. The Land Use Regulations further recognize the inherent incompatibility of residential and mining uses. Although limited residential use may be permitted within the Mining Zone District, the Land Use Regulations expressly limit such use to only those situations "where the owner of such [residential] use recognizes and understands that the residential character of the property may be adversely impacted by the predominant mining use." *Id.*

Indeed, High Speed's existing mining to the north of the Property had generated numerous complaints regarding noise and other environmental impacts from nearby residential users. (PCR 01317.) One residential neighbor near High Speed's preexisting mining operations specifically complained about being able to hear "rocks crashing" and "reverse beacons" from inside his home. (PCR 01217.) Other neighboring residents similarly complained about noise as well as heavy truck traffic, dust pollution, and threats to the groundwater supply from High Speed's existing mining operations to the north of the Property. (PCR 01220; PCR 01252; PCR 01253; PCR 01254; PCR 01276.) The administrative record includes numerous photos of High Speed's existing mining operation to the north of the Property:





(PCR 01205.) Leaving aside potential private nuisance claims and/or potential enforcement actions by the County, the mining that High Speed has engaged in on the site to the north of the Property is generally the type of use that is permitted by right within the Mining Zone District. As set forth in High Speed's application for a state mining permit, its mining operations include excavation of placer materials and the associated rock, washing of construction materials, recovery of placer gold, stockpiling of products, and loading of highway trucks. (PCR 01342.) This application further confirms that mining may occur for up to 13 hours per day six days per week, and further suggests that processing activities may occur 24-hours per day. (PCR 01346.) All such uses would appear to fit within the definition of uses by right within the Mining Zone District and will continue to occur on the Property if its rezoning within the Mining Zone District is upheld.

During the rezoning petition process, High Speed confirmed that it intends to mine the entirety of the Property over a period of 10 to 20 years to within 50 feet of the residential properties

to the east and west of the Property and to within 100 feet of the residential properties to the south of the Property. (PCR 01496; PCR 01500-01.)

ii. High Speed's Zoning Violation

Prior to the rezoning, High Speed only held a state mining permit to mine the land to the immediate north of the Property. On February 9, 2017, High Speed was fined by the Colorado Division of Reclamation, Mining and Safety ("DRMS") for disturbing 2.4 acres of land outside of its mining permit boundary. (PCR 01562.)

Thereafter, Park County began investigating whether or not the unlawful mining conducted by High Speed also violated Park County land use law. (PCR 01556.) During these initial discussions, the Park County Planner informed High Speed that a rezoning of the undisturbed portion of the Property from residential to mining would "likely not be successful." (*Id.*) On March 21, 2017, Park County sent a notice of violation to High Speed regarding High Speed's unlawful mining at the Property within the Residential Zone District. (*Id.*) On June 8, 2017, Park County Development Services ordered High Speed to cease and desist all mining and commercial activities at the Property. (PCR 01149.) Thereafter, DRMS denied High Speed's application to convert its existing state mining permit to a Hard Rock 112 permit because High Speed failed to "demonstrate to the Division's satisfaction that [High Speed was] no longer in violation of Park County Land Use Regulations." (PCR 01565-66.) As this process played out, High Speed confirmed on several occasions that it had unlawfully mined a portion of the Property in violation of Park County Land Use Regulations and worked to move forward with a rezoning before the BOCC to convert the rezone the Property. (PCR 01556-57.) On June 22, 2017, Park County Development Services suspended its June 8 Cease and Desist Order "[p]ursuant to direction from

the Board of County Commissioners of Park County." (PCR 01150.) This order expressly allowed High Speed to resume mining operations at its washing plant located within the Residential Zone District (in violation of the Park County Land Use Regulations) while Park County considered High Speed's rezoning Petition. (*Id.*)

iii. The Park County Rezoning Process

Under the Park County Land Use Regulations, a rezoning (referred to as a zoning "Map Amendment") may be initiated by either a landowner or the County. L.U.R. § 5-200. Before the County may act upon a petition to rezone a property, the Planning Department must first confirm that the petition contains all of the information required by the Park County Land Use Regulations. L.U.R. § 5-201. As specifically relevant to this appeal, a petition "shall contain" the following information:

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- E. A complete legal description of the property proposed for zoning map amendment prepared by a licensed registered Colorado Land surveyor or, for County-initiated petitions only, prepared by the Planning Director/County designee, County Attorney, or County Surveyor (in most cases, a copy of the legal description contained in the deed will suffice);

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- G. A signed and notarized certification from the Applicant that proper notice has been provided to the mineral estate owner pursuant to and in accordance with Colorado Revised Statutes § 24-65.5-103, or a certification that such notice is not required because the surface estate has not been separated from the mineral estate for the

property described in the application. A form of certification is provided in Appendix B.

- H. A map or other description of the current condition of the property to be rezoned ("Current Conditions Map") including, in one or more mapped, narrative, or graphic formats, the following information:
1. Topography of the property shown in elevation contours of not greater than ten (10) foot increments. Applicants are encouraged to use the U.S.G.S. topographic mapping or other form of commercially produced topographic map.
  2. Points of access to the property, internal roads, and trails including widths and approximate grades. The Current Conditions Map must illustrate how access is obtained from the property subject to zone map amendment to the nearest county road or highway.

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*(Id.)* The Land Use Regulations explicitly provide that "[n]o petition for zoning map amendment shall be processed or scheduled for processing before the Planning Commission or the Board of County Commissioners unless the Planning Director/County designee deems the petition complete and all required information and documentation is submitted to the Planning Director/County designee." L.U.R. § 5-202(A).

Once this completeness determination has been made, the rezoning petition is submitted to the Park County Planning Commission to hold a public hearing and to make an approval or denial recommendation to the BOCC. L.U.R. § 5-202(B). Thereafter, the BOCC is required to hold a separate public hearing on the rezoning petition. L.U.R. § 5-202(C). At this public hearing, the BOCC must consider whether the applicant has met its burden of proof to demonstrate by "clear and convincing evidence" that the following circumstances exist:



1. The property possesses geological, physical, and other environmental conditions that are compatible with the potential uses permitted in the proposed zone district; and
2. The property has a reasonably certain right of permanent legal access permitting vehicular ingress and egress from the property to the public thoroughfare; and
3. Access to the property from the public thoroughfare reasonably meets County street, road, or driveway standards or, if the property is undeveloped, such access will be established prior to issuance of a building permit; and
4. The potential uses of the property within the proposed zone district are compatible with other properties within the immediately surrounding area; and
5. And at least one of the following:
  - a. The rezoning, as proposed, is consistent with the advisory provisions of the Park County Strategic Master Plan; or
  - b. The rezoning, as proposed, is supported by circumstances and conditions within the immediate area which have changed since the adoption of the Park County Strategic Master Plan; or
  - c. The rezoning, as proposed, is to a Planned Unit Development.

(L.U.R. § 5-203.)

iv. Approval of High Speed's Rezoning Petition

High Speed submitted its Petition to rezone the Property on April 24, 2017. (PCR 01556; PCR 01408-41.) The Petition did not include a legal description prepared by a licensed Colorado land surveyor, but the Park County Planner nevertheless found this petition requirement satisfied with a hand-written notation that reads: "(ON DEED)". (PCR 01409.) The Petition also failed to include a signed and notarized certification that notice has been provided to the mineral estate owner (or a certification that such notice is not required). (PCR 01408-41.) While the Petition does include several maps of the Property, none of these maps show: (i) the topography of the Property using elevation contours of ten feet (or less); or (ii) internal roads and trails with their

widths and approximate grades. (PCR 01420-24.) The only natural features depicted in the maps submitted with the Petition show the approximate location of the 100-year floodplain and slopes with an estimated grade of more than 25 percent. (*Id.*) Despite these deficiencies, the Park County Planner determined that the Petition included all required information on or about May 9, 2017. (PCR 01556; PCR 01408-11.)

After a one-month delay (at the request of High Speed), the Planning Commission held a public hearing on the Petition on July 11, 2017, consistent with Land Use Regulation 5-202(B). (PCR 01552.) At the conclusion of that hearing, the Planning Commission voted to deny the rezoning by a vote of 4 to 1. (PCR 01318.) The Planning Commission's opposition to the Petition primarily focused on High Speed's inability to satisfy Standard of Approval 1 (compatibility with the physical characteristics of the Property) and Standard of Approval 4 (compatibility with surrounding properties). (*Id.*)

Following the Planning Commission hearing, the Park County Director of Development Services prepared a Staff Report and recommendation to the BOCC. (PCR 01315-18.) The Staff Report noted that the Planning Department had received substantial public comment on the Petition and that "[p]oints of opposition include noise, environmental concerns, views, property values, traffic and road impacts." (PCR 01318.) The Staff Report discussed the incompatibility of the proposed rezoning with the surrounding residential uses and ultimately agreed with the recommendation of the Planning Commission and recommended that the BOCC deny the Petition "due to an inability to meet standard of approval number 4 as submitted." (PCR 01315-18.)

The BOCC then held a public hearing on the Petition on July 27, 2017. At the BOCC hearing, High Speed made clear that the rezoning was necessary to allow for the "Gold Rush"

television show to continue filming at the Property and argued that the rezoning would bring in additional tourists as a result of the Discovery Channel television show. (PCR 00473-82.)

At the start of the BOCC hearing on the Petition, all three members of the BOCC were present. However, a little more than halfway through the public hearing on July 27, 2017, one of the commissioners abruptly left the hearing during the public comment period to attend a dentist appointment. (PCR 00445.) At this point, High Speed was given the option to either continue the hearing or to proceed with the hearing and continue any decision on the Petition until after the absent commissioner had a chance to review the remainder of the testimony presented at the hearing. (PCR 00452-55.) High Speed elected to continue with the hearing, and the remainder of the public hearing on July 27, 2017, continued with only two commissioners presiding. At the close of the July 27, 2017 public hearing, the County Attorney continued the hearing "for deliberations and potential decision" on the Petition to the BOCC meeting scheduled for August 2017. (PCR 00494.)

However, when the BOCC reconvened to consider the Petition on August 17, 2017, it did not conduct any public deliberation with regards to the High Speed rezoning Petition. (PCR 00562-67.) The matter was noticed on the BOCC agenda for "deliberation and possible decision," but when the matter was considered by the BOCC, there was no deliberation—instead, there was nothing more than the County Attorney reading a proposed resolution into the record and the BOCC summarily approving Resolution 2017-46 (the "Resolution"), which approved the Petition. (*Id.*) This Resolution was not considered at the July 2017 public hearing, and prior to its presentation at the August 2017 hearing, the Resolution had never been made available to the public. Before the County Attorney read the Resolution, he explained that the Resolution was

prepared "[a]t the direction of the [BOCC]" (PCR 00562). However, there is no public record of the BOCC giving such direction and it is unclear when the BOCC directed the County Attorney to prepare the Resolution. Prior to the final vote on the Resolution, the BOCC Chairman refused to reopen public comment on the Resolution and instead directed opponents of the Petition to "read the conditions that were - - that [High Speed] conceded to, you know, in this rezoning. They are extremely stringent on their operation . . . . So we took - - they took that into consideration. We took that into consideration and ended up at our decision." (PCR 00566-67 (emphasis added).) Again, this statement was made before the BOCC voted on the Resolution and was made at a time that it should have been impossible for the BOCC Chairman to know how the BOCC would vote on High Speed's Petition.

The Appellant Neighbors are not aware of any public meeting(s) where the BOCC engaged in deliberations regarding the Resolution or any of the proposed conditions of approval that were formally presented for the first time at the August 17, 2017 hearing.<sup>2</sup> There is similarly no public record to explain how the BOCC Chairman knew what the BOCC's "decision" would be in advance of the BOCC's vote on the Resolution.

Following the Chairman's public statements, the BOCC considered and approved the Resolution without any discussion, deliberation, or consideration of the standards of approval and

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<sup>2</sup> Opponents of the Petition were not permitted to publicly comment on the newly presented Resolution before it was adopted. When members of the public were permitted to speak during the open public comment period later in the BOCC meeting, one member of the public specifically pressed the BOCC as to how and when the Resolution was prepared. In response, the County Attorney explained: "The Board in two separate public sessions, actually - - during work sessions - - deliberated and then also conducted an executive session (indiscernible) specific legal questions." (PCR 00640.) The Appellant Neighbors have not located any documentation of these alleged deliberations anywhere in the administrative record.

burden of proof.<sup>3</sup> (PCR 00567.) As approved, the Resolution rezones the entirety of the Property to be within the Mining Zone District. (PCR 01505-06.) The Resolution allows for mining on the property to within 50 feet of the east and west property boundaries (and the Town of Fairplay residential development to the east and the neighboring Residential Zone District to the west) and to within 100 feet of the southern property boundary (and the neighboring Residential Zone District to the south). The Resolution allows for mining on the Property twelve hours per day from Monday through Saturday (but no federal holidays). (*Id.*)

### STANDARD OF REVIEW

Government actions are reviewed pursuant to C.R.C.P. 106 for an abuse of discretion. *Gallegos v. Garcia*, 155 P.3d 405 (Colo. App. 2006); *Venard v. Dept. of Corr.*, 72 P.3d 446 (Colo. App. 2003). A reviewing court may reverse the decision of an administrative agency if the court finds that the agency acted arbitrarily or capriciously, made a decision that is unsupported by the record, interpreted the law erroneously, or exceeded its authority. C.R.S. § 24-4-106(7); *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001). A government action taken in violation of applicable law constitutes a *per se* abuse of discretion. *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004).

Moreover, a government abuses its discretion when its decision is not reasonably supported by competent evidence within the administrative record. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899-900 (Colo. 2008). "Lack of competent evidence occurs

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<sup>3</sup> The BOCC's failure to conduct any deliberations regarding the Petition stands in stark contrast to the Planning Commission, which specifically discussed each of the standards of approval and potential conditions of approval before ultimately voting to recommend denial. (PCR 01760; *see generally* PCR 00187-217.)

when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* at 900. While a land use decision is not a "popularity contest," there should be "competent and substantial documentary and testimonial evidence" to support a quasi-judicial body's land use decision—especially when the body fails to make particularized findings. *See Sundance Hills Homeowners Assoc. v. Bd. of County Comm'rs*, 534 P.3d 1212, 1216 (Colo. 1975). A quasi-judicial administrative decision must be based upon findings of fact within the administrative record and failure to make express factual findings on a core issue may be grounds for remand to the administrative body to make such findings. *Canyon Area Residents v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 909-10 (Colo. App. 2006).

A quasi-judicial decision must provide for due process and adhere to fundamental principles of fairness. *See Churchill v. Univ. of Colo. at Boulder*, 2012 CO 54; *Canyon Area*, 172 P.3d at 908. As such, a quasi-judicial body's failure to correctly interpret governing law or otherwise remain within its lawful authority constitutes reversible error. *Nixon v. City & Cnty. of Denver*, 2014 COA 172, ¶ 12. Moreover, a quasi-judicial hearing must be conducted in an atmosphere evidencing fairness in the adjudication. *Canyon Area*, 172 P.3d at 908.

## ARGUMENT

### **1. The BOCC Abused Its Discretion When It Violated the Colorado Open Meetings Law and the Plaintiffs' Rights to Procedural Due Process By Publicly Rubber Stamping a Decision that Was Made in a Non-Public Meeting and Without Public Deliberation.**

The Colorado Open Meetings Law (the "COML"), C.R.S. § 24-6-401, *et seq.*, provides that any formal government<sup>4</sup> action in Colorado must occur at a public meeting that is "open to the

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<sup>4</sup>This includes any formal actions taken by a Board of County Commissioners as COML expressly applies to counties as "political subdivisions of the state."

public at all times." C.R.S. § 24-6-402(2)(a). The intent of the COML is to ensure that "citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests. A citizen does not intelligently participate in the legislative decision-making process merely by witnessing the final tallying of an already predetermined vote." *State v. Cole*, 673 P.2d 345, 349 (Colo. 1983) (emphasis added). Accordingly, final approval of a decision previously made in a non-public meeting is a violation of the COML. *Van Alstyne v. Housing Auth.*, 985 P.2d 97 (Colo. App. 1999) (holding that approval at an open meeting must constitute more than a "rubber stamp" of decision made outside the public record).

Here, the BOCC did not hold any public deliberation regarding the Resolution. Instead, nearly three weeks after the initial public hearing on the Petition was first continued, the BOCC "reopened" the hearing for the narrow purpose of having the County Attorney read a brand-new draft resolution into the record. The BOCC did not deliberate regarding the Petition or any of the newly presented conditions of approval, and the Chairman of the BOCC expressly referred to the BOCC's "decision" to approve the Resolution in the past tense and before the public vote actually occurred. (PCR 005667 ("We took that into consideration and ended up at our decision."))

Colorado law provides that a COML violation may be proved by evidence that a government body made a secret decision before publicly ratifying this decision through a sham public process. In *Little Educ. Ass'n v. Arapahoe Cnty. Sch. Dist.*, 553 P.2d 793, 798 (Colo. 1976), the Colorado Supreme Court held that a school district labor agreement was reached in violation of the COML because the record showed that non-public negotiations were handled by government representatives and at least one elected official. The *Little Education Association* Court did not

focus on the dates, times, or locations of these unlawful closed meetings and made no issue of the fact that only one elected official attended these private negotiations. *See id.* Rather, the court explained that by engaging in unspecified secret meetings that ultimately resulted in a government action, the final public decision to ratify that decision was unlawful: "the [COML's] prohibition against making final policy decisions or taking formal action in other than a public meeting is not meant to permit 'rubber stamping' previously decided issues. The [COML is] remedial, designed *precisely* to prevent the abuse of 'secret or 'star chamber' sessions of public bodies.'" *Id.* (quoting *Bagby v. School Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974)). The court further reasoned that this is the only result that is consistent with public purpose underlying the COML. *Id.* ("Further, in the absence of any express legislative policy expressions, we believe that citizens should have an opportunity to become fully informed and involved with matters on which foreseeable action will be taken and which will have a direct effect on their welfare."); *see also Bagby*, 528 P.2d at 1302 ("As a rule, these kinds of statutes should be interpreted most favorably for the beneficiary, the public.").

In the present matter, the BOCC Chairman expressly acknowledged that the BOCC had already reached a decision on the Petition before the BOCC publicly voted to approve the Resolution. Although the BOCC's agenda provided that the BOCC would publicly deliberate the newly-presented Resolution, the BOCC did not engage in any substantive discussion of the Resolution before the vote to approve the rezoning. Similarly, members of the public, who were never previously given a chance to review the final language within the Resolution, were not allowed to make any public comments with regards to the Resolution. The BOCC did not discuss



the standards for approval and provided no particularized findings to support the BOCC's summary vote to approve the Resolution. This was a textbook case of a sham public hearing.

A quasi-judicial decision must provide for due process and adhere to fundamental principles of fairness. *See Churchill*, 2012 CO 54; *Canyon Area*, 172 P.3d at 908. As such, a quasi-judicial body's failure to correctly interpret governing law or otherwise remain within its lawful authority constitutes reversible error. *Nixon*, 2014 COA 172, ¶ 12. Moreover, a quasi-judicial hearing must be conducted in an atmosphere evidencing fairness in the adjudication. *Canyon Area*, 172 P.3d at 908.

Here, the BOCC apparently made a secret decision to approve the Petition before presenting the final Resolution to the public for the first time and without any opportunity for public comment. The BOCC violated the COML when it rubber stamped its preordained decision to approve the rezoning and in doing so, trammelled the due process rights of the Appellant Neighbors, who were given no meaningful opportunity to publicly comment on the Resolution or even witness the BOCC's secret deliberations.

The BOCC abused its discretion by unlawfully approving the rezoning in violation of the COML. The only proper recourse is to reverse the Resolution and deny the rezoning.

## **2. The BOCC Had No Discretion to Act Upon High Speed's Incomplete Rezoning Petition.**

The Park County Land Use Regulations expressly provide that all petitions for rezoning "shall contain" ten different categories of information (L.U.R. § 5-201) and further provide that "[n]o petition for zoning map amendment shall be processed or scheduled for processing before the Planning Commission or the Board of County Commissioners unless the Planning Director/County designee deems the petition complete and all required information and

documentation is submitted to the Planning Direct/County designee" (L.U.R. § 5-202(A)). Relevant here, a Park County rezoning petition must include: (1) a complete legal description of the property prepared by a licensed registered Colorado Land surveyor (L.U.R. § 5-201(E)); (2) a signed and notarized certification that proper notice has been given to the mineral estate owner or a certification that such notice is not required (L.U.R. § 5-201(G)); and (3) a Current Conditions Map that depicts the topography of the property "in elevation contours of not greater than ten (10) foot increments" (L.U.R. § 5-201(H)(1)) and "internal roads and trails including widths and approximate grades" (L.U.R. § 5-201(H)(2)).

Here, the administrative record confirms that High Speed submitted its Petition to the County without any of this required information. (*See* PCR 01408-41.) Specifically, although the Petition includes legal descriptions for the three parcels that make up the Property, there is nothing which would indicate that this description was prepared by a "licensed registered Colorado Land surveyor." (PCR 01412-14.) Moreover, because the Property to be rezoned was comprised of only portions of two of these parcels, the legal descriptions of those entire parcels do not accurately describe the area to be rezoned. Similarly, the Petition does not include any discussion with regards to who owns the subsurface mineral estate and does not include any certification that notice of the Petition was provided to the subsurface mineral estate owner or (a statement that such notice is not required). Finally, although the Application does include several maps (PCR 01420-24; PCR 01437; PCR 01441), none of these maps appear to depict the Property in elevation contours of less than twenty feet, as required by L.U.R. 5-201(H)(1). These maps also fail to identify internal roads and trails with the requisite level of specificity—although there is one map that shows an internal road (PCR 01423), this map does not provide the width and approximate grade

of the road and similarly does not depict any other trails or mining roads. High Speed explicitly acknowledged that there were other trails on the Property (PCR 00306), but none of these trails are identified on any of the maps submitted with the Petition.

While the foregoing might appear to be inadvertent oversights on the part of High Speed, the Park County Land Use Regulations do not provide for any flexibility regarding the completeness of a rezoning petition. All of this missing information is expressly required by the Park County Land Use Regulations. In the absence of this material information, High Speed's Petition should never have been deemed complete and the matter never should have been set for hearings before the Planning Commission and the BOCC. The BOCC therefore abused its discretion in unlawfully approving the incomplete Petition and the only proper remedy is the reversal of the Resolution and the denial of the Petition. *See Wolf Creek Ski Corp. v. Bd. of Cnty. Comm'rs*, 170 P.3d 821, 830 (Colo. App. 2007) (C.R.C.P. 106 appeal holding that a Board of County Commissioners abused its discretion in approving a subdivision application which did not include evidence of year-round access, as required by law).

### **3. The Rezoning Constitutes Spot Zoning in Violation of Colorado Law.**

The BOCC further abused its discretion by engaging in unlawful spot zoning to benefit the narrow interests of High Speed and to the detriment of surrounding land owners. Prior to the rezoning, the Property was designated within the Residential Zone District consistent with the residential and open space uses that surround the Property on three sides. High Speed expressly sought to rezone the Property because it is more valuable to High Speed to mine the Property than to create a residential subdivision at the site. (PCR 01760.) The record also contains statements from neighboring land owners stating that they researched the surrounding zoning designations

before purchasing homes near the Property and relied upon the Property's zoning within the Residential Zone District to mean that mining would never move further south away from the Platte River. (*See, e.g.*, PCR 00450 ("I see that zoning is a promise to people who are looking to purchase property in this county. I studied all the zoning and studied all of the issues around my property before I bought it and saw what was inked on those maps as a promise to me of what would happen around where my property was that I was going to purchase."); PCR 00463.)

Colorado's prohibition against spot zoning is rooted in the fundamental tenet that "unless a zoning line is drawn somewhere there can be no zoning at all." *Clark v. Boulder*, 362 P.2d 160, 162 (Colo. 1961). In order to protect neighboring users and ensure the predictability of a holistic scheme of land use planning, an allegation of spot zoning examines "whether the change in question was made with the purpose of furthering a comprehensive zoning plan or [was] designed merely to relieve a particular property from the restrictions of the zoning regulations." *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961).

Colorado's prohibition on spot zoning was first recognized in *Clark v. Boulder*, 362 P.2d 160. There, the Colorado Supreme Court rejected an attempt to rezone property from residential to commercial to permit the operation of a gas station adjacent to another business park, which also contained a gas station. *Id.* at 161, 163. In reversing the reclassification from residential to commercial, the *Clark* Court refused to consider the fact that "the property may not be used as profitably for residential purposes as for commercial use" and instead focused on the neighbors' "right to rely on existing zoning regulations where there has been no material change in the character of the neighborhood which may require re-zoning in the public interest." *Id.* at 162. The

*Clark* Court further confirmed that such a change in the permissible land use would only be legitimate:

[I]f the character and use of a district or the surrounding territory have become so changed since the original [zoning designation] was enacted that the public health, morals, safety and welfare would be promoted if a change were made in the boundaries or in the regulations prescribed for certain districts; but mere economic gain to the owner of a comparatively small area is not a sufficient cause to involve an exercise of this amending power for the benefit of such owner.

*Id.* (quoting *Leahy v. Inspector of Bldgs.*, 31 N.E.2d 436, 439 (Mass. 1941)). Consistent with this reasoning, the *Clark* Court reversed the reclassification from residential to commercial use on the grounds that "there is no indication that the [decision] was intended to further the comprehensive general plan" and instead "has all the earmarks of a special act enabling the [applicant] to build" an incompatible land use. *Id.* at 161.

The present matter similarly "has all the earmarks of a special act enabling" High Speed to lawfully mine a property that has been zoned within the Residential Zone District since Park County first adopted a comprehensive zoning plan in 1974. In approving the Resolution, the BOCC did not make any finding that circumstances in the intervening four decades have changed in a manner that makes this rezoning consistent with a comprehensive general plan. Moreover, the record does not include any evidence of such changed circumstances to support even an implicit finding that the rezoning was something more than a special favor for a single land owner. High Speed admitted that it only sought the rezoning so that it could benefit economically by mining the Property. In contrast, the record contains statements from numerous surrounding landowners that changing the Property's zoning from residential to mining directly contradicts Park County's turn towards an economy based on tourism and outdoor recreation. (*See, e.g.,*

PCR 00437-38, PCR 00441, PCR 01148; *see also* 2016 Park County Strategic Master Plan, at pp. 18-19 (*available at* <https://www.parkco.us/DocumentCenter/View/2622/Park-County-Strategic-Master-Plan-Update>) (listing "Evolve and Expand Tourism" as one of twelve goals for Park County's vision for land use planning).)

The record demonstrates that the BOCC rezoned the Property solely for the economic benefit of High Speed and without any consideration of whether such change was compelled by changed circumstances or otherwise consistent with a comprehensive scheme for land use planning. Because spot zoning has long been held illegal in Colorado, the BOCC acted in a manner that exceeded its lawful authority and the Resolution must be reversed.

**4. The BOCC Abused Its Discretion in Finding that High Speed Presented Clear and Convincing Evidence of All Required Elements for Rezoning.**

Under the Park County Land Use Regulations, the BOCC could not approve High Speed's Petition unless it first found that High Speed had demonstrated compliance through clear and convincing evidence with all five conditions of approval. L.U.R. § 5-203. The "clear and convincing evidence" evidentiary standard is a term of art under Colorado, which is a heightened standard requiring a greater showing than the presumptive civil standard of a mere preponderance of the evidence. CJI-Civ § 3:2. More specifically, to find "clear and convincing evidence," a factfinder must find a proposition to be "highly probable" and with "no serious or substantial doubt." *Id.*; *see also M.W. v. D.G.*, 710 P.2d 1174, 1175 (Colo. App. 1985) ("Clear and convincing evidence' means evidence which is stronger than a 'preponderance of the evidence,' and which is highly probably and free from serious or substantial doubt.").

A review of the administrative record confirms that High Speed did not present any competent evidence sufficient to support a finding by clear and convincing evidence that: (a) the

physical, geological, and environmental conditions of the Property are compatible with mining; and (b) mining is compatible with other properties in the immediately surrounding area. Each of these deficiencies is addressed in turn below.

- a. *The BOCC Abused its Discretion by Ignoring the Undisputed Evidence that Mining Is Objectively Incompatible with the Physical, Geological, and Environmental Conditions of the Property.*

Neither High Speed's Application nor the BOCC's Resolution explains why either believe that the physical conditions of the Property are compatible with mining. The majority of the Property is undisturbed forest land, and High Speed has not made any commitment to preserve any of those trees. (PCR 01316.) Several members of the Planning Commission found that High Speed's plan to "strip[ ] the land of its trees" is an obviously incompatible environmental impact that would result in "a destruction of the area." (PCR 00190-91.)

Moreover, the forested nature of the Property and the Property's close proximity to the Platte River also led the County to designate the potential wildlife impact across the entire Property as "High." (PCR 01171.) The presumptive industrial uses allowed by right within the Mining Zone District will have a significant impact on wildlife in the area. High Speed claimed at the BOCC hearing that it would work with Colorado Parks and Wildlife to prevent wildlife from becoming trapped in its mining pits (PCR 00483), but the final Resolution does not include this as a condition of approval and High Speed has not committed to any enforceable mitigation of wildlife impacts.

At the BOCC hearing, High Speed claimed that the Property is compatible with mining because of the previous disturbance of a portion of the Property, including High Speed's *own* prior violations of the Park County Land Use Regulations. (PCR 00304-07.) High Speed does not,

however, explain how a history of unlawful non-conforming use can be used as clear and convincing evidence that the characteristics of the Property are compatible with a rezoning from residential to mining. Obviously, any alleged "historical use" of the Property for mining was not sufficient to have the parcel zoned for mining when Park County first promulgated a comprehensive zoning scheme in 1974.

Without more from either High Speed or the BOCC (who did not publicly deliberate regarding any conditions of approval), it is impossible to conclude that High Speed met its burden to provide the BOCC with clear and convincing evidence that the physical characteristics of the Property are compatible with mining. Accordingly, the BOCC acted arbitrarily in adopting the Resolution, and the Petition should instead be denied.

- b. *The BOCC Abused Its Discretion by Ignoring the Undisputed Evidence that Mining is Objectively Incompatible with the Other Properties in the Immediately Surrounding Area.*

Both High Speed and the BOCC similarly failed to address the surrounding compatibility issues raised by surrounding neighbors and summarized in the Planning Department Staff Report. The Staff Report notes that: "the proximity of Residentially-zoned properties has already resulted in complaints regarding noise and environmental impacts. The proposed expansion of the operation would result in mining activity within 100 yards of residences on nearby lots, and no buffer or setback is proposed with the application." (PCR 01317.) As approved, the Resolution permits High Speed to mine within 50 feet of adjacent residential properties to the east and west and permits High Speed to conduct mining operations 12 hours per day (beginning at 7 a.m.), six days per week. (PCR 01505.)



In deciding to recommend denial of the Petition, the Planning Commission found that High Speed could not demonstrate compatibility with the surrounding residential properties. (PCR 01318.) Members of the Planning Commission specifically expressed concerns about the lack of any meaningful buffer between the proposed mining and existing residences to the south and the long-term impact on property values. (PCR 00195-99.) High Speed did not provide any evidence to address any of the opponents' concerns regarding home values and, in its presentation before the BOCC, claimed that a "100-foot buffer from the road" was a sufficient buffer to ensure compatibility between industrial-scale gold mining and neighboring residences. (PCR 00308.)

Again, this is not clear and convincing evidence of compatibility. The BOCC abused its discretion in finding that High Speed demonstrated that the rezoning to mining will be compatible with surrounding residential zones, and the Resolution must be reversed.

**5. Alternatively, the Absence of Any Detailed Findings Requires Remand to the County for Particularized Findings that Will Permit a Meaningful Appellate Review.**

The Appellant Neighbors believe that the administrative record and the argument set forth above requires this Court to reverse the BOCC's approval and instead order the BOCC to deny the rezoning Petition. If, however, this Court has questions as to whether or not the BOCC did have a legitimate basis for approving the rezoning Petition, the BOCC did not include any such justifications in the Resolution.

Colorado law provides that a quasi-judicial decision must include findings and conclusions to support the government's determinations as to the material issues. *See Colorado State Bd. of Medical Examiners v. Ogin*, 56 P.3d 1233, 1238 (Colo. App. 2002). Where a government fails to make adequate findings in the record, it is appropriate for the trial court to remand the case with directions to make findings of fact or conclusions of law necessary for meaningful appellate

review. *See* C.R.C.P. 106(a)(4)(IX); *Bd. of Cnty. Comm'rs v. Conder*, 927 P.2d 1339, 1350 (Colo. 1996). At a bare minimum (which itself is "not good administrative practice"), a government must at least make findings as to the "ultimate facts." *Sundance Hills Homeowners Ass'n*, 534 P.2d at 1216.

Here, the BOCC made no factual findings regarding any of the standards of approval that High Speed was statutorily required to demonstrate by clear and convincing evidence. As to the ultimate issue in this case, the Resolution merely includes a conclusory statement that: "compliance with the standards for approval of a rezoning set forth in Section 5-203 of the Park County Land Use Regulations has been demonstrated by clear and convincing evidence." The BOCC failed to even address this perfunctory statement at the August 17, 2017 hearing, where it approved the Resolution.

There are no findings on the ultimate facts in this case, and the Resolution does not provide this Court with any meaningful avenue for appellate review and the Resolution may not be affirmed without first remanding this matter to the BOCC to adopt particularized findings regarding all required elements for the rezoning.

### **CONCLUSION**

For the reasons set forth above, the Appellant Neighbors respectfully request that this Court reverse the BOCC's approval of the rezoning Petition, order the BOCC to deny the rezoning Petition, and provide such other and further relief as it deems just and proper.

Respectfully Submitted: June 11, 2018.

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**CERTIFICATE OF SERVICE**

I certify that on this 11th day of June, 2018, a copy of the foregoing **Plaintiffs' Opening Brief** was filed and served via CCEF upon the following:

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