

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: September 3, 2015 8:13 AM CASE NUMBER: 2014CV34721
<hr/> Plaintiff: BALLPARK NEIGHBORHOOD ASSOCIATION, INC., v. Defendants: THE CITY AND COUNTY OF DENVER; THE BOARD OF ADJUSTMENT FOR ZONING APPEALS FOR THE CITY AND COUNTY OF DENVER; THE DENVER RESCUE MISSION, a Colorado Nonprofit Corporation	<hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 14CV34721 Courtroom: 303
ORDER	

This matter comes before the Court on Plaintiff, Ballpark Neighborhood Association, Inc.'s, appeal pursuant to C.R.C.P. 106 ("Rule 106"). On June 1, 2015, Appellant, Ballpark Neighborhood Association, Inc. filed their "Opening Brief." On July 6, 2015, Appellee, The Denver Rescue Mission, filed their "Answer Brief." On July 20, 2015, Appellant filed their "Reply Brief."

The Court, after considering the Opening Brief, the Answer Brief, the Reply Brief, and the administrative record, and otherwise being sufficiently advised, finds that no hearing is necessary and enters the following Findings and Orders:

I. BACKGROUND

Plaintiff initiated this lawsuit to seek judicial review under C.R.C.P. §106(a)(4) alleging that Defendants City and County of Denver and its Board of Adjustment for Zoning Appeals (hereinafter, collectively, "City") abused their discretion and exceeded their jurisdiction by

approving an application for a use permit and then issuing a permit to Defendant Denver Rescue Mission (hereinafter, "DRM") for a "community center."¹

Originally, DRM referred to the project as an expansion of the existing DRM shelter, but after meeting with zoning officials changed the name of the Center to the Lawrence Day Center, and subsequently decided on the name of "Denver Rescue Mission Lawrence Street Community Center." The project also originally included a set of doors which would connect the Center with the current DRM homeless shelter. This was eliminated in further plans.

On June 26, 2014, DRM applied for a permit to build a Community Center. On May 30, 2014, DRM submitted a Design Development Phase application to the Zoning Administrator (hereinafter "ZA"), which was approved on July 31, 2014. The Planning Board reviewed the project and the submitted application on June 18, 2014, and recommended approval of the project. The permit for the Community Center was approved on July 7, 2014.

On August 8, 2014, Ballpark appealed the City's decision to the Board. The Board held a hearing on the matter on October 21, 2014, and issued a ruling on November 18, 2014, upholding the City's decision. See Defendant's Exhibit A.

DRM currently owns and operates a homeless shelter located immediately adjacent to the proposed Community Center. Plaintiff contends DRM's proposed use of the new building is not for a Community Center, but for an expansion to its existing homeless shelter. Therefore, the ruling by the Board in granting this permit was an abuse of discretion as the undisputed evidence shows that DRM intends to operate the Center as an expansion to their Shelter and not as a Community Center. Defendant counter argues the Board decision is supported by ample record in the evidence to defeat Ballpark's Rule 106(a)(4) challenge.

¹ Whether DRM's proposed "community center" is actually a community center or whether it is an expansion of the existing DRM shelter is in dispute. Therefore, this Order will refer to the proposed "community center" as the "Center" for clarity.

II. STANDARD OF REVIEW

Under Rule 106, the Court must set aside an administrative decision if the agency, in its exercise of quasi-judicial authority, exceeds its jurisdiction or abuses its discretion. C.R.C.P. §106(a)(4); *Elec. Power Research Inst. v. City & County of Denver*, 737 P.2d 822, 825 (Colo. 1987). For an abuse of discretion, the Court must find the decision is not supported by competent evidence, meaning the decision is so devoid of evidentiary support it is arbitrary and capricious. *Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs of Jefferson Cnty.*, 172 P.3d 905, 907 (Colo. App. 2006), *as modified on denial of reh'g* (Nov. 9, 2006). The Court is not the fact finder, and it cannot substitute judgment if there is competent evidence to support the zoning board's decision. *Bd. of County Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). Even if evidence is presented to an agency that is contrary to its ultimate decision, as long as the record as a whole contains sufficient competent evidence to support the decision, it will not be overturned. *Martinez v. Bd. of Comm'rs of Hous. Auth. of City of Pueblo*, 992 P.2d 692, 696 (Colo. App. 1999).

However, in considering the abuse of discretion standard, the Court may evaluate whether the agency misconstrued or misapplied the law, and the Court is not bound by an erroneous legal interpretation. *Van Sickle v. Boyes*, 797 P.2d 1267, 1274 (Colo. 1990); *Regents of Univ. of Colo. v. Meyer*, 899 P.2d 316, 318 (Colo. App. 1995). Land use codes “are subject to the general canons of statutory interpretation.” *City of Colo. Springs v. Securecare Self Storage, Inc.*, 10 P.3d 1244, 1248–49 (Colo. 2000). Thus, in evaluating legal interpretations of zoning ordinances, the Court must “look first to the plain language” of the code, and “presume that the governing body enacting the code meant what it clearly said.” *Shupe v. Boulder County*, 230 P.3d 1269, 1272 (Colo. App. 2010). If the language of the code is ambiguous, the Court must “give great deference to the BOA’s interpretation” if there is a “reasonable basis” for the interpretation of the law, and it is supported in the record. *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). If such reasonable basis exists, the Court may not set aside the

decision on the grounds of an erroneous legal interpretation. *Wilkinson v. Bd. of County Comm'rs*, 872 P.2d 1269, 1277 (Colo. App. 1993). In general, the Court should normally defer to the legal interpretation of the administrative officials charged with the law's enforcement. *City & County of Denver v. Bd. of Adjustment (Denver v. BOA)*, 55 P.3d 252, 254 (Colo. App. 2002). And lastly, the party challenging the administrative action bears the burden of overcoming this presumption of validity. *Id.*

I. DISCUSSION

DRM applied for a primary use permit to build the Center. When issuing a primary use permit, use is defined as, “[t]he purpose for which land or structures thereon is designed, arranged or intended to be occupied or used, or for which it is occupied, maintained, rented or leased.” Denver Zoning Code (hereinafter “Code”) §13.3-36. Therefore, the Board looks at the “intended use” of the building. This is the major issue in this case, and where the Board committed an abuse of discretion.

The Board found the Center met the proposed use for a “community center” under the Code and therefore upheld the permit approval. A “community center” is defined by the Code as “[a] building, together with lawful accessory buildings and uses, used to provide social, recreational, cultural, educational, health care and/or food services, which is not operated for profit.” Code 11.12.3.2(b)(1). Clearly, the proposed Center falls within the definition of a “community center” as defined by the Code. This is not in dispute, and is the rationale behind the Board’s issuance of the permit. However, simply falling within the definition of a “community center” is not sufficient to grant a primary use permit. The Board was required to look at the intended use of the building, and this intended use, as clearly established by the facts, does not fall within the definition of a “community center” as defined by the Code.

The evidence weighs heavily against the contention that DRM intended the Center to be used as a community center. DRM is in the business of serving the homeless population and originally planned this project as an expansion. This was changed to a “community center” after

DRM met with zoning officials. The only change made to the original proposed plan for the expansion and the current community center is the elimination of a shared set of doors between the buildings. Even after submitting its permit application for a community center, DRM still referred to the Center as an expansion of the shelter in other documents. For example, in letters to their financial supporters DRM stated the building would be an expansion. At the board hearing, witnesses corroborated this stating DRM intended this building to be used as an expansion.

Further, if the Center were to be considered an expansion of the existing shelter, DRM would not be able to obtain a primary use permit for an expansion of the DRM shelter because the shelter is considered a “compliant use” under the Code. A compliant use is one that is continuing even though the use does not comply with current use regulations. Code §13.3-36. This allows existing uses to be grandfathered in. *Id.* Compliant uses are permitted to continue operating even though they are in violation of the current zoning code provided they operate on the same lot and in the same area before the use became compliant. Code §12.5.3.2. Therefore, in order to expand the existing shelter, DRM would have had to apply for a compliant use variance pursuant to Code §12.5.3.4, or establish a limited expansion. Code §12.5.33. A variance requires a public hearing before the Board as well as a finding of unnecessary hardship balanced with lack of impairment to surrounding buildings and communities. Code §12.4.7.4-12.4.7.6. Limited expansions of compliant uses are authorized in special cases only. Code §12.5.3.3(a). The facts substantially support the contention that DRM changed the name of the project from an expansion to a community center to circumvent zoning requirements, and therefore the Board committed an abuse of discretion in upholding the permit approval.

Although the center meets all the requirements for a community center as defined by the Code, this is not the standard. The standard is the *intended use* of the building, which is clearly not for a community center. The Board’s decision lacks sufficient evidentiary support to uphold its finding as the only evidence that supports the buildings use as a community center is that it

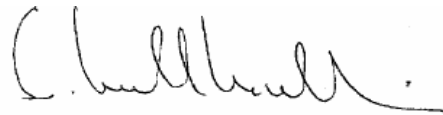
meets the definition of a community center under the Code. This was arbitrary and capricious and an abuse of discretion.

III. CONCLUSION

The Board's decision is REVERSED.

So Ordered.

Date: Thursday, September 03, 2015

A handwritten signature in black ink, appearing to read "R. Mullins", written over a light gray rectangular background.

R. MICHAEL. MULLINS
District Court Judge