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DISTRICT COURT, DOUGLAS COUNTY, COLORADO Court Address: 4000 Justice Way Castle Rock, CO 80109-7546	
Plaintiffs: CHATFIELD COMMUNITY ASSOCIATION, INC., a Colorado non-profit corporation; TOM MANSFIELD, MARY KAY MANSFIELD, JOE ROTTMAN, ANDY ROTTMAN, RICK STEVENSON, DENNIS LARRATT, JENNIFER RIEFENBERG, *et.al.* Defendants: BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY Intervenors: STERLING RANCH, LLC, a Colorado limited liability company; STERLING RANCH TOO, LLC a Colorado limited liability company; and STERLING RANCH FORE, LLC a Colorado limited liability company	Case Number: 11CV1437 Ctrm.: Div. 1
ORDER	

THIS COURT, having reviewed the Court file, the pleadings, the lengthy briefs submitted by all parties along with the voluminous record prepared and submitted to the Court, applicable statutes, case law and county regulations relating to Douglas County Zoning Resolution Section 15 (Planned Development) and Zoning Resolution 18A (Water Supply) and hereby issues the following Order:

The Plaintiffs brought this action seeking judicial review, pursuant to C.R.C.P. 106(a)(4), C.R.C.P. 57 and Section 13-51-101, of a decision by the Defendant Board of County Commissioners of Douglas County (hereinafter "the Board" or the "BOCC") approving the Sterling Ranch Plan Development and the Sterling Ranch Water

Application and Appeal. The Court permitted Sterling Ranch LLC; Sterling Ranch Too, LLC and Sterling Ranch Fore LLC to intervene in this matter. The Court will refer to these entities collective as the Applicant or Intervenors/Applicant. Citations to the record will be by volume and page number where applicable or by BCCO page number. Citations to the Douglas County Zoning Regulations will be by DCZR number.

The relief sought by the Plaintiffs in their Complaint for Judicial Review and Declaratory Judgment is GRANTED.

The Court is cognizant that it cannot reverse the decision of an administrative body unless the Court finds an abuse of discretion, an act conducted outside the jurisdiction of the body or a misapplication of the law. See *Tri-State Generation and Transmission v. City of Thornton* 647 P.2d 670 (Colo. 1982) *Western Paving Construction Co. v. Beer* 917 P.2d 344 (Colo. App. 1996). Courts presume the validity and regularity of official acts of public officials and entities and that public officials discharge their duties properly and in compliance with the law. See *Crested Butte South Metropolitan District v. Hoffman* 790 P.2d 327 (Colo. 1998) and *Babi v. Colorado High School Activities Ass'n* 77 P.3d 916 (Colo. App. 2003). In order to determine that there has been an abuse of discretion the court must find that there is no competent evidence in the record to support the decision of the administrative body. *City and County of Denver v. Board of Adjustment* 55 P.3d 252 (Colo. App. 2002). The reviewing court is limited to the evidence contained in the record and cannot substitute its own judgment for that of the administrative body. The court is also obligated to view the evidence in a light most favorable to the decision of the administrative body. See *Johnson v. Griffin* 240 P.3d 404 (Colo. App. 2009).

In 2008 Douglas County updated its Comprehensive Master Plan and designated a large portion of the Chatfield Valley as the Chatfield Urban Area. In November of 2008 the Applicant met with officials from Douglas County to engage in preliminary discussions concerning the Applicant's plan to rezone approximately 3000 acres in unincorporated Douglas County from Agricultural and Residential to Planned Development. In February of 2009 the Applicant submitted an application for rezoning

in support of its efforts to create a planned development on this land. The application contained information relating to traffic impact, economic impact, drainage studies etc. The plan involved a dense mixed-use town center surrounded by tightly knit-villages that decreased in density as they moved to the outer boundaries of the development. The residential and commercial areas were interspersed with 1200 acres of open space and parks and the development also included plans for equestrian only trails, a sports complex, recreation centers and swimming pools. (See page 10 of Intervenors' Response) The total build-out contemplated some 12,000 dwelling units as part of the development. (See Board discussion at Vol. 8 p. 1382 – 1389 concerning a range of between 9170 and 12,000 dwelling units.) The County responded by reviewing the submittal and referring the Applicant to other entities that would be entitled to notice of the application. The Plaintiff Chatfield Community Association was one such entity. The County, the Applicant and the other entities exchanged information and concerns. Studies were done and reports were generated. The Applicant also submitted a Water Plan which was updated in April of 2009 and May of 2010. (See BCOO3488 - BCC003618). A first draft of a Water Appeal was submitted in August of 2009. (See BC014373-BCCO14426) In October of 2010 a public hearing was conducted before the Douglas County Planning Commission concerning the application. This hearing lasted five days and numerous entities and citizens spoke to the application. In April of 2011 the application came before the Board along with a Water Supply Standard Appeal brought by the Applicant. Again a lengthy hearing process ensued with much testimony from entities, the public and various experts. On May 11, 2011 the Board unanimously voted to approve the Applicant's Planned Development and also granted the Water Appeal. The initial application approved by the Board contained information about water supply and demand. (See Exhibit A to Plaintiffs' Opening Brief). On May 31, 2011 the Board adopted a formal resolution approving the application and a formal application approving the Water Appeal. A formal resolution approving the application and the Water Appeal was adopted by the Board in November of 2011 *nunc pro tunc* to May 11, 2011. The final version of the application does not contain information

about water supply and demand but instead, refers to the Water Appeal. While the Plaintiffs have raised several arguments concerning the decision of the Board (See pages 4 and 5 of Plaintiffs' Opening Brief), the Court finds the crux of this matter, pursuant to C.R.C.P. 106, to be the following:

1. Did the Board exceed its jurisdiction or abuse its discretion in approving the Applicant's Planned Development?
2. Did the board exceed its jurisdiction or abuse its discretion in granting the Applicant's Water Appeal?

In order to resolve these issues the Court must also determine that the Plaintiffs had no plain, speedy and adequate remedy provided by law.

The Court shall address these issues in order.

Approval of the Planned Development

A planned unit development (PD) is defined at Section 24-67-103(3) as "an area of land, controlled by one or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational, or industrial uses, or any combination of the foregoing, the plan for which does not correspond in lot size, bulk or type of use, density, lot coverage, open space or other restriction to the existing land use regulations." Douglas County's regulations governing planned developments are contained in section 15 of the Douglas County Zoning Resolutions. The Court shall review the applicable regulations and then address the statutory provisions that govern the application.

DCZR 1501 establishes the intent of the zoning regulations as follows: "To encourage innovative and creative design and to facilitate a mix of use in the development of a balanced community including residential, business, commercial, recreational, open space and other selected secondary uses, in accordance with Section 24-67-101, et. seq., C.R.S. Growth should occur in a phased and contiguous manner to save on the costly, premature extension of basic infrastructure."

DCZR 1502 describes the general requirements imposed on the owner of a PD. In particular DCZR 1502.05 requires the following: "All uses proposed in the Planned

Development shall be served by a central water and sanitation facility, unless this Zoning Resolution permits the proposed uses to be served by an individual well and an individual septic system."

DCZR 1503 establishes approval criteria for a planned development rezoning. In particular DCZR 1503.02 mandates compliance with "all applicable statutory provisions." DCZR 1503.10 requires the subject land to contain a "water supply sufficient in terms of quantity, dependability and quality as determined in conformance with section 18A, Water Supply – Overlay District, herein."

DCZR 1506 imposes general submittal requirements on any owner of property seeking to create a planned development. In particular Section 1506.09 requires the application to provide "Evidence of a sufficient water supply in accordance with Section18A, Water Supply –Overlay District, herein."

As noted at DCZR 1503.02 Douglas County zoning regulations mandate compliance with applicable statues. Those statues include Section 29-20-301 C.R.S. *et.seq.* These statutory provisions, enacted in 2008, address adequate water supply in local government regulation of land use. It is important to note, at section 29-20-301(1)(b) C.R.S. that our legislature has declared that "... while 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 of Colorado." Our legislature went on to define adequate, as it relates to the supply of water, at Section 29-20-302(1) C.R.S. as follows: "a water supply that will be sufficient for build-out of the proposed development in terms of quality, quantity, dependability, and availability to provide a supply of water for the type of development proposed, and may include reasonable conservation measures and water demand management measures to account for hydrologic variability."

Pursuant to Section 29-20-303 C.R.S. local government is not to approve an application for development permit unless it determines, in its sole discretion, that the applicant has satisfactorily demonstrated that the proposed water supply will be

adequate. According to Section 29-20-103(1) C.R.S. a "development permit" means "any 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." Local government is to make a determination of adequacy of water supply only once during the development permit approval process. Local government has the discretion of determining the stage in the development permit approval process at which this decision is to be made. This statute does not require the applicant to have acquired the proposed water supply or constructed the related infrastructure at the time of the application. In addition, pursuant to Section 29-20-304 C.R.S. the applicant must submit an estimated water supply report that conforms to the requirements of that statute.

In sum, the County's zoning regulations mandate that an applicant for a planned development permit must establish that the development will have a water supply through build-out and this water supply is sufficient in terms of quantity, dependability and quality. The application is also subject to applicable statutory provisions. Those statutory provisions require that local government deny a planned development permit unless the applicant has demonstrated that its proposed water supply will be adequate. A preliminary or final approval of a rezoning application is considered to be a development permit. "Adequate" for the purposes of determining water supply is defined as a water supply that will be sufficient through build out. While local government is given discretion in determining when it will decide whether the water supply is adequate, this decision is to be made during the **development permit approval process**. (Emphasis added by this Court). An application for a planned development seeks to obtain a development permit.

The Board argues, at page 14 of its answer brief, that it is not yet required to demonstrate adequate water supply. It is the position of the Board that the water appeal, which permits adequacy determinations to be made at specifically defined stages, satisfies the Board's obligation to determine the adequacy of the water supply. The Board argues that the discretion it is given by Section 29-20-303(1) C.R.S. in

deciding when to determine the adequacy of the water supply supports its decision to approve the planned development. At page 22 of its brief the Board states its argument as follows: "The Board's exercise of discretion deferring the timing for showing an adequate water supply does not mandate the conclusion that a water supply is legally inadequate. If it did, the statutory language granting a county explicit discretion to determine the appropriate stage of a **land use approval process** when to make the determination of adequacy would be meaningless." (Emphasis added by this Court). While there is a process involved in obtaining Board approval for the use of the land, it is the issuance of the development permit that is at issue in this matter.

The Board accurately summarized the land use approval process at pages 3 and 4 of its brief. The Planned Development approval is the first step in the process. It establishes the zoning for the property in question and involves a significant amount of effort on the part of the County involving input from various entities, exchange of information from other agencies, testimony from interested parties, and potential amendments to the application. As noted by the Board the completed and approved planned development is just the beginning of the land use process. Subsequent phases include subdivision which involves a sketch plan, a preliminary plan and a final plat. In addition an applicant may be required to submit a Site Improvement Plan, a plan for grading and a Site Improvement Plan Improvements Agreement. The process can take years.

The Court is not unmindful of the amount of work and energy spent by the Board in reviewing this application. The Court is aware that the Board reviewed considerable evidence and testimony in considering this application. There are repeated examples of the concern expressed by the Board with respect to the water demand of this project and whether an adequate water supply existed. At Vol. 5 p. 796 through 810 there is a discussion of the applicability of the statutory scheme to the permit sought by the applicant. There is also frank discussion by the Board with the applicant concerning the complexity of this project, the uncertainty of determining the adequacy of the water supply as it relates to adjudicating water rights and obtaining federal permits along with

the creation of the appropriate infrastructure. The Board acknowledges that it certainly does not want to put the County, the Applicant or any citizen in the position of dealing with platted salable lots that don't have a ready water supply. At Vol. 6 p. 865 the Board addresses the issue of water supply versus a water supply plan. The Board discusses voiding a plat if a water supply isn't constructed and provided within a certain period of time after the creation of the plat. The Applicant responds by stating that a voidable plat would be at a competitive disadvantage to any other plat. There are certainly points in the discussion at which the Board is concerned about guaranteeing the water supply and the fact that it appears as if the applicant does not have a permanent sustainable water supply. (Vol. 6 p. 905; Vol. 6 p. 934-935). There is reference made that the finished version of the approval should contain a commitment that no home will be built without an adequate water supply. (See Vol. 9. p.1405). It is clear that, based on the significant amount of information provided to the Board, a compromise was struck concerning the obligation of the applicant to demonstrate an adequate water supply exists. That compromise is the Water Appeal. Both the County and the Applicant readily acknowledge that the Water Appeal permits the determination of the adequacy of the water supply to be deferred to specifically defined stages of this development. The County argues that this would only make sense given the fact that the County would be made aware of the water demand at the specific stage and can then determine whether an adequate supply exists. The Intervenors/Applicant concur with the County's decision to defer proof of water supply to the subdivision stage of the development. Both the Board and the Applicant argue that this discretion is permitted pursuant to the language in Section 29-20-303(1) C.R.S. that gives local government the discretion to determine "the stage in the development approval process at which such determination is made." The Board argues that it makes more sense to make these determinations as the development progresses, noting that the application will develop over many years and many phases. Certainly the Court is cognizant of the somewhat fluid process of land use development and the practical response of the

Board to defer water supply determination until the stages of the development become imminent.

However, the Court notes that the statutory scheme provided at Section 29-20-101 *et.seq.* and Section 29-20-301 *et.seq.* impose conditions and requirements on the regulation of land by local government. First, pursuant to Section 29-20-103(1) C.R.S. our legislature has defined "development permit" as any preliminary or final approval of an application for rezoning, planned unit development, conditional or special use permit, subdivision, development or site plan, ..." The Applicant submitted a "land use application" in February of 2009. (See BCCO0001). As noted by the Board this application for a planned development establishes the zoning for the subject property and is the product of considerable effort on the part of the Board based on an input from interested parties and agencies and public hearings. The Board must approve the planned development before any development can occur. The Court finds that the planned development stage involves a "development permit" as defined in Section 29-20-101(1) C.R.S. The Court understands that the planned development permit is only the beginning of the process and additional steps can occur including subdivision development which involves the submission of a Sketch Plan followed by a Preliminary Plan and then the submission of a Final Plat. Each of these stages involve a referral period, notice to the public and a public meeting before the Board. Each of these stages also requires approval of the Board. However, before any of these stages can occur the Board must approve the planned development. The Court finds that the permit for the planned development fits squarely under the definition of "development permit" as contained in Section 29-20-101 C.R.S.

Pursuant to Section 29-20-303 C.R.S. the applicant for a development permit is under an obligation to demonstrate that the proposed water supply will be adequate. Because the application for a planned development requires a development permit, the Court finds that the Applicant must establish the proposed water supply will be adequate. The Board **shall not** approve an application unless it is satisfied that the applicant has demonstrated that the water supply will be adequate. While the statute

does not require the applicant to own the water supply or have the infrastructure constructed, it still must demonstrate that the water supply will be adequate at the time of the application. The Board must find that a water supply will be adequate in order to approve the development permit. Adequate is defined at Section 29-20-302 as a water supply sufficient for **build-out** of the development in terms of quality, capacity, dependability and availability. The Applicant confesses, at p. 29 of its brief, that it did **not** submit proof of a water supply to the Board. Instead, it filed a water appeal that requests deferral of the obligation to establish adequate water supply until the various stages of the subdivision process. What the applicant has provided to the Board is a plan to provide a water supply instead of demonstrable proof that the proposed water supply will be adequate. This is a plan that is subject to review by the Board and also subject to a subsequent determination by the Board that the water supply is inadequate for a proposed stage of the subdivision process. The Applicant has not demonstrated, at any point during the development permit approval process for this planned development permit, that the proposed water supply will be adequate. The Board, at the time it granted the application, did not have before it adequate information to determine that the water supply proposed by the Applicant will be adequate. Instead it was offered a plan in which adequacy would be determined at each stage of the development. This does not comply with the requirement mandated by Section 29-20-303 that the determination of the adequacy of the proposed water supply be made only once during the development permit approval process. What the plan offers is the opportunity for the Board to deny requests for subdivision approval if the water supply is not adequate. The plan does not provide proof to the Board of the adequacy of the water supply during the development permit approval process for this planned development permit.

The Board's argument that it can determine the adequacy of the water supply during these subsequent phases defeats the purpose of Section 29-20-301 *et.seq.* This legislative scheme mandates that local government determine, **prior to approval of the development permit**, that the applicant has demonstrated that the proposed

development will have an adequate water supply. While local government has discretion in deciding when to make this determination, its discretion is limited to the development permit approval process. While the Board acknowledges that the statute mandates it has only one opportunity to make this determination, the Board has concluded that it can satisfy this obligation by making determinations at each subsequent phase of the process. (See page 22 of the Board's brief). Instead of a determination made prior to the approval of the development permit, the Board argues that it can determine at each subsequent phase of the land use process whether there is an adequate water supply. The very nature of this argument concedes that the Board, at the time of the approval of the planned development, could not determine that an adequate water supply through build-out will exist. The statute does not require the applicant to own or have acquired the proposed water supply or the related infrastructure at the time of the application. However, the statute does clearly require the Board to determine, before the application is approved, that the applicant has demonstrated that the proposed water supply will be adequate. The Applicant has failed to make this demonstration.

Requiring proof of water supply adequacy prior to approval of a planned development permit certainly may present obstacles and difficulties to the applicant. However, the statutes and the county regulations mandate that local government is to determine the adequacy of the water supply before approving a development application. In this case the applicant freely admits that it did not submit proof of an adequate water supply as part of its application. (See page 29 of Intervenors/Applicant's Response). For the Board to approve the application without the Applicant demonstrating that the proposed water supply is adequate, is an abuse of discretion and not in compliance with the requirements of Section 29-20-303 C.R.S. The Board has no authority to approve the application without the Applicant demonstrating the adequacy of the water supply.

The Intervenors/Applicant admit that they did not submit proof of a water supply with the application. (See Vol. 5 p. 752 at 6-9, testimony of Mr. Lytle) Instead, the

Intervenors/Applicant argue that the water appeal was filed for the purpose of seeking deferral of the obligation to establish an adequate water supply until subdivision phase of the development. The Intervenors/Applicant argue, at page 27 of their brief, that requiring the developer of a large cohesively planned community to have all of its water in hand and fully adjudicated for use at the rezoning state would be cost prohibitive and would significantly delay the development. The Intervenors/Applicant go on to argue that constructing a conjunctive water supply and delivery system is substantially more expensive than a supply and deliver system based on non-tributary groundwater. The Intervenors/Applicant admit that, because the water appeal application requested a decrease in the water demand standard, the Applicant could not even determine at the rezoning stage how much water would be required to satisfy the water supply standard.

These arguments all seek to excuse the Applicant from complying with the statutory requirements of Section 29-20-301 C.R.S. *et.seq.* and the requirements of Douglas County Zoning Regulations. The Court certainly understands the nature and practicalities of the arguments raised by the Applicant. However, these arguments do not provide justification for noncompliance with the requirements imposed by statute and county zoning regulations.

Water Appeal

According to the Intervenors/Applicant the Water Appeal was filed for the purpose of deferring the obligation on the part of the Intervenor to establish an adequate water supply until the subdivision stage of the land use process. This admission runs counter to the requirement of Section 29-20-303 C.R.S. that an adequate water supply be determined only once during the **development permit approval process.** The argument that the Water Appeal should be used to defeat the requirement of Section 29-20-303 C.R.S. establishes noncompliance with the statutory scheme required by Section 29-20-301 C.R.S. *et.seq.* and county regulations. Permitting the appeal to avoid the requirements of Section 29-20-303 C.R.S. is an action outside the scope of the authority of the Board. At Vol. 9 p. 1369 of the voluminous record submitted in this case, a member of the Board stated "... it's entirely proper through this Water Appeal

process that we not know where the water is going to come from until they are ready to tell us..." It appears that the Applicant had not established the source of the water necessary to sustain this development through build out at the time the planned development permit was authorized. The Applicant is under an obligation pursuant to Section 29-30-302 C.R.S. to establish that the water supply will be adequate before a permit is approved. The Water Appeal cannot be used to thwart the requirements of the development permit approval process.

Conclusion

The Defendant Board has exceeded its jurisdiction and abused its discretion by granting the approval of this development without an adequate water supply. In order to challenge the decision of the Board the Court further finds that the Plaintiffs had no plain, speedy or adequate remedy at law other than to proceed pursuant to C.R.C.P. 106. Given this determination the Court need not resolve additional issues raised by the Plaintiffs and responded to by the Defendant and Intervenors/Applicant.

On Plaintiffs' first claim for Relief, Judicial Review, the Court finds that the decision of the Board to approve this Sterling Ranch Development Plan and the Sterling Ranch Water Appeal was outside its jurisdiction and authority and an abuse of its discretion. Judgment enters in favor of Plaintiffs and against Defendant on this claim. The decision of the Board granting approval to this application and granting the Water Appeal is REVERSED.

On Plaintiffs' second claim for Relief, Declaratory Judgment, the Court finds that Board's approval of the Sterling Ranch Development Plan and the Sterling Ranch Water Appeal was outside the authority and jurisdiction of the Board and an abuse of its discretion. Judgment enters in favor of the Plaintiffs and against the Defendant and the approval of the Sterling Ranch Development Plan and the Sterling Ranch Water Appeal is REVERSED.

Any request for attorney fees by the Plaintiffs is DENIED.

Dated and signed this 22nd day of August, 2012.

BY THE COURT:

ORIGINAL SIGNATURE ON FILE
PAUL A. KING
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true, accurate and complete copy of said Order was electronically filed via LexisNexis this 22nd day of August, 2012.

ORIGINAL SIGNATURE ON FILE
Char Hansen
Court Judicial Assistant, Div. 1