

District Court, Summit County, Colorado P.O. Box 269 501 N. Park Avenue Breckenridge, Colorado 80424	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
DOUGLAS W. POLANSKI, Plaintiff v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SUMMIT, STATE OF COLORADO, Defendant	
OPINION AND ORDER	

THIS MATTER comes before the District Court for Summit County, Colorado, by way of plaintiff Douglas W. Polanski’s (“Polanski”) request for judicial review of a decision of the Summit County Board of County Commissioners (the “Board”) pursuant to C.R.C.P. 106(a)(4). The Court received the parties’ original briefs, and then requested several rounds of supplemental briefing. The Court has reviewed the record and the arguments submitted by the parties. After a full and fair consideration thereof, the Court now issues this Opinion and Order.

STANDARD OF REVIEW

In a C.R.C.P. 106(a)(4) proceeding, judicial review is limited to a determination of whether the Board exceeded its jurisdiction or abused its discretion, based upon evidence contained in the record made before the Board. *See* C.R.C.P. 106(a)(4)(I); *Woods v. City and County of Denver*, 122 P.3d 1050, 1053 (Colo. App. 2005), *cert. denied*.

When determining an abuse of discretion, a reviewing court is limited to determining whether the agency’s decision was manifestly arbitrary, unreasonable, or unfair. *People v. Wallin*, 167 P.3d 183, 187 (Colo. App. 2007).

Generally, an agency's interpretations of its own rules will be given deference and will be accepted if they have a reasonable basis in law and are warranted by the record.¹ *Jayhawk Cafe v. Colo. Springs Liquor and Beer Licensing Bd.*, 165 P.3d 821, 824 (Colo. App. 2006), citing *Regents of Univ. of Colo. v. City and County of Denver*, 929 P.2d 58, 61 (Colo. 1996). Nevertheless, the agency's interpretation is advisory only – a court is not bound to defer to an agency determination that misconstrues or misapplies the law. *Stevinson Imports, Inc. v. City & County of Denver*, 143 P.3d 1099, 1101-02 (Colo. App. 2006), *cert. denied*. Further, a misinterpretation or misapplication of governing law can constitute an abuse of discretion. *Alward v. Golder*, 148 P.3d 424, 428 (Colo. App. 2006), citing *Save Park County v. Bd. of County Commissioners*, 990 P.2d 35 (Colo. 1999). It must be clearly noted, however, that an agency's interpretation of its own regulations is not reviewed *de novo*. *Covered Bridge, Inc. v. Town of Vail*, 197 P.3d 281, 283 (Colo. App. 2008), citing *Quaker Court Ltd. Liab. Co. v. Bd. of County Commissioners*, 109 P.3d 1027, 1030 (Colo. App. 2004), *cert. denied*.

Despite the somewhat free hand given in reviewing an agency's application of regulations or laws, the Court may conduct only a limited review of a lower body's factual findings. *Save Park County*, 969 P.2d at 714. The review is limited to whether competent evidence supports the body's factual findings. *Id.* Applying that standard, a factual finding must be upheld unless it is "so devoid of evidentiary support [in the record] that it can only be explained as an arbitrary and capricious exercise of authority." *Id.*, citing *Bd. of County Comm'rs of Routt County v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996).

¹ The Court notes that where an ordinance's reasonableness is "fairly debatable," deference is to be given to the Board. *See, e.g., Williams v. City & County of Denver*, 622 P.2d 542, 546 (Colo. 1981).

BACKGROUND

In 1978, Oliver and Catherine Stonington (the “Stoningtons”) owned four parcels of real property, which are in the Upper Blue River Basin of Summit County, Colorado and are described as Lots 16, 17, 18, and 19 Silver Shekel, Filing #2 (“Lots 16-19”). In a letter dated June 6, 1978 (“Stoningtons’ Letter”), the Stoningtons requested that the Board vacate the lot lines and utility easements between Lots 16-19.² In the Stoningtons’ Letter, they indicated in 1978 that they “do not plan to build on the adjacent lots.” Shortly thereafter, the Board granted the Stonington’s request. The Board did so through Resolution No. 78-192, thereby creating one unified parcel that shall be referred to herein as Current Lot 16. To be clear, Current Lot 16 is the aggregate of Lots 16-19, as shown on a plat entitled Silver Shekel Filing No. 2, recorded July 26, 1968 at Reception No. 110064 with the Summit County Clerk and Recorder.³ The Stoningtons’ letter was not attached to Resolution No. 78-192, nor was it ever recorded as an encumbrance or in any other form with the Summit County Clerk and Recorder.

In April 2006, Polanski acquired Current Lot 16. At present, it is slightly more than two acres in size.⁴ After acquiring Current Lot 16, Polanski requested that the original lot lines for Lots 16-19 be reinstated for the purpose of creating four lots of approximately one-half acre apiece (the “Application” or “Polanski’s Application”). Polanski’s Application was initially before the Upper Blue Planning Commission (“UBPC”), which unanimously recommended that the Board deny the request.⁵

² Opening Brief, Exhibit 21.

³ From the record, it appears that there is no recorded plat showing Current Lot 16 as such; instead, the 1968 Silver Shekel plat remains as the last recorded plat, and it shows Lots 16-19. The County’s assessment maps, however, do show Current Lot 16 with the lot lines vacated.

⁴ See generally Staff Report, 1/9/2007, Part 1, included in Admin. R., filed October 3, 2007.

⁵ See Staff Report, 1/9/2007, Part 1.

The Application then went before the Board. While noting that the UBPC recommended denial of the application, the Board nevertheless conditionally granted Polanski's Application, through Resolution #2007-16. The Board, however, restricted its approval of the plat recreating Lots 16-19 upon the following condition:

4. Prior to recordation of the final plat, [Polanski] shall acquire three transferable development rights, by any acceptable legal means, and dedicate the same to the property [referred to hereinafter as "Condition No. 4"].⁶

The Board provided the following reasons for imposing Condition No. 4:

7. The property was granted a lot line vacation in 1978 which removed three of the four then existing lots from the present parcel. That application and approval for a lot line vacation was specifically premised on the express representation from the property owner [the Stoningtons] that [" in order to protect its location and beauty, we do not plan to build on the adjacent lots."]
8. The County relied on this material representation to its detriment, foregoing decades of property tax revenues, and assessments for public improvements afforded to the Silver Shekel subdivision. In all relevant aspects, the subject property has been treated as one parcel and one unit of density since 1978. Accordingly, [Polanski's] present proposal to recreate the three vacated lots is a drastic departure from the auspice of that 1978 representation, and all actions taken in reliance thereon. Therefore, approval of such a subdivision would effectively result in either a de aequitate or de facto increase in density on the Property, without the introduction of a requisite quantity of transferable development rights, in accordance with the development policies and goals of the Summit County Land Use and Development Code, Countywide Comprehensive Plan, and Upper Blue Master Plan. Such density concerns may be remedied upon compliance with all of the conditions set forth below.⁷

Polanski disputed the Board's authority to require the acquisition and dedication of the three transferable development rights ("TDRs"), and therefore did not comply with Condition

⁶ See Resolution #2007-16, included in Admin. R. submitted October 3, 2007.

⁷ See *id.*

No. 4. As a result, the Board later denied Polanski's request for approval of a final plat for noncompliance on July 24, 2007, through Resolution 2007-63.⁸

Current Lot 16 is located in an area presently subject to "R-2" zoning, which allows for a density of two houses per acre. As Current Lot 16 is slightly larger than two acres, it can accommodate four houses under the R-2 designation when properly subdivided.⁹ There is presently a single house, constructed by the Stoningtons, on Current Lot 16.

Polanski initiated this action for judicial review, claiming the Board abused its discretion and exceeded its jurisdiction in requiring the acquisition and dedication of the TDRs. Polanski claimed that the primary effect of the Board's determination has been to deprive him of being able to construct three other houses upon Current Lot 16, as per the existing R-2 designation.

ISSUES PRESENTED

The Court addresses the following issues:

- I. The Board's rationale in Paragraphs Seven and Eight of Resolution #2007-16 for Requiring the TDRs as a Condition of Approval for Polanski's Application
- II. The Board's Consideration of the Applicable Master Plans
 - a. Mandatory Nature of Master Plans
 - b. Interpretation of Master Plans

⁸ Note that Resolution 2007-63, dated July 24, is the Board's denial of approval for Polanski's final plat. This denial was based on Polanski's refusal to acquire and dedicate the TDRs, which was a condition of final approval imposed by Resolution 2007-16, dated February 27. Thus, there are technically two Resolutions at issue here. But, because Resolution 2007-63's denial was a result of the conditions imposed by Resolution 2007-16, it is actually only Condition No. 4 from 2007-16 that is under review.

⁹ See Staff Report, 1/9/2007.

ANALYSIS

I. The Board's Rationale in Paragraphs Seven and Eight of Resolution # 2007-16 for Requiring the TDRs as a Condition of Approval for Polanski's Application

In conducting its analysis, the Court first examines the reasons, provided by the Board in Resolution # 2007-16, for requiring the TDRs as a condition of approval for Polanski's Application. The Court begins by briefly recounting the factual background that led to the Board's determination.

On February 26, 2007, county attorney Daniel Teodoru ("Teodoru") issued a legal memorandum to the Board and several other recipients ("the Memo").¹⁰ It addressed "the implications of the doctrine of equitable estoppel" regarding Polanski's request to reinstate lot lines on Current Lot 16 to re-create four separate parcels. The Memo noted "a relative dearth of case law regarding the assertion of estoppel by a governmental entity against a private entity." It nonetheless proceeded to apply an equitable estoppel analysis to Polanski's Application regarding Current Lot 16. The Memo found that the statement in the Stoningtons' Letter regarding their plan not to build on adjacent lots constituted a "material representation." The Memo declared that the County "reasonably relied on such representations to its detriment, observing that it could not collect significant assessments and taxes as a direct result of obliging the Stoningtons' request. The Memo concluded "justice would require that the property owner and his successors [Polanski] now be held accountable for such reliance." In that regard, the Memo further determined that the requirement of introducing TDRs "might represent an appropriate remedy."

¹⁰ Opening Brief, Exhibit 10.

Turning to the language employed by the Board in Resolution No. 2007-16, the Court notes it did not mention the term “equitable estoppel.” Nevertheless, the Court finds that Paragraphs 7 and 8 of Resolution No. 2007-16 do closely track each of the key preceding conclusions as originally provided in the Memo.¹¹ Most significantly in this regard, Paragraph 7 concluded that the Stoningtons’ statement in 1978 that they did “not plan to build” on the adjacent lots was equivalent to an “express representation.” Paragraph 8 stated that “[t]he County relied on this material representation to its detriment, foregoing decades of property tax revenues, and assessments for public improvements.....” Finally, Paragraph 8 closed by requiring TDRs as a remedy to Polanski’s “drastic departure” from the “1978 representation” made in the Stoningtons’ Letter. Consequently, after conducting a thorough comparative review of the Memo to Resolution No. 2007-16, the Court finds that the Board predominantly applied the doctrine of equitable estoppel in assessing Polanski’s Application and that said doctrine also comprised the primary basis for the Board’s imposition of TDRs as a requisite in Condition No.4.¹² As a result, the Court now determines whether the Board’s use of equitable estoppel had a reasonable basis in law and was warranted by the record.

The elements of equitable estoppel are:

- 1) The party to be estopped (Polanski) must know the facts and (a) intend the other party to rely upon them or (b) act so that the other party is ignorant of the true facts; and

¹¹ Opening Brief, Exhibit 14.

¹² In its Answer Brief, the Board acknowledged that it “did make a determination regarding equitable estoppel upon [Polanski] due to the preceding owner’s longstanding disposition of the property.” Answer Brief, 13. As a result, the Court’s finding has already been partially conceded by the Board in its own pleadings. The Board did also argue that its equitable estoppel determination was “in the alternative.” *Id.* In reviewing the clear and unambiguous language of the Memo and Paragraphs 7 and 8 of Resolution No. 2007-16, however, the Court disagrees and reemphasizes its finding that equitable estoppel was the primary basis for the Board’s consideration of and decision regarding Polanski’s Application.

- 2) The party asserting estoppel (the Board) must rely on the other party's conduct and suffer a resultant injury.

Comm. for Better Health Care for All Colo. Citizens by Schrier v. Meyer, 830 P.2d 884, 891-92 (Colo. 1992) The doctrine of equitable estoppel applies to misstatements or other misrepresentations of fact. *Board of County Commissioners v. DeLozier*, 917 P.2d 714 (Colo. 1996).¹³

In examining Resolution 2007-16 against the preceding equitable estoppel elements, the Court finds as a matter of law the Board made no finding that Polanski possessed personal knowledge regarding the statements made in 1978 in the Stoningtons' letter. Furthermore, since there is no evidence that the Stonington's Letter was filed with the Summit Clerk and Recorder or that it was even referenced in Resolution No. 78-192, there can be no finding of record notice for the purpose of imputing knowledge to Polanski. This is a fatal defect. Without such a finding, the Board's analysis of the equitable estoppel issue in Resolution 2007-16 was incomplete. Without evidence that Polanski had actual or constructive knowledge of the Stoningtons' letter, equitable estoppel could not be proven. Therefore, the Court concludes as a matter of law that the Board's assessment of Polanski's Application on the grounds of equitable estoppel is not supported by competent evidence, did not have a reasonable basis in law, and was not warranted by the record. The Court thereby concludes as a matter of law that the Board abused its discretion in utilizing equitable estoppel as the basis for imposing TDRs on Current Lot 16 as a requisite condition for approval of the Application.

¹³ As the Memo itself observed, the Court has been unable to locate through its own independent research any Colorado case law where a governmental entity successfully employed the doctrine of equitable estoppel against a private individual. Accordingly, there is a serious question as to whether the doctrine of equitable estoppel has any instant application at all to Polanski's Application. Assuming hypothetically that it might, the Court engages in an analysis of the doctrine, as applied, to determine whether the Board abused its discretion.

While the foregoing alone is sufficient to support a finding that the Board abused its discretion, the Court also observes it is clear that other equitable estoppel elements were not met. First, the representation at issue in the Stoningtons' Letter did not constitute a misstatement or other misrepresentation of fact. In 1978, the Stoningtons stated that they did "not plan to build" on adjacent lots. That statement was not a promise or a representation that they would never seek to build on Current Lot 16. Furthermore, it was not recorded nor was any other action taken to encumber Current Lot 16 to prevent further building. As such, the Court finds that the plain language of the statement in the Stoningtons' Letter demonstrates nothing more than a declaration of their present intent at that moment in 1978. It cannot be construed as a binding promise on their part and, even if it could, there is no way to attribute such a promise to Polanski. Finally, because the Stonington's Letter does not contain a binding promise or representation as to building on the adjacent lots, the Court also finds a matter of law that the Board could not have reasonably relied on it to its detriment. If the Board had intended to rely on this representation, it could easily have solidified the promise by requiring some more permanent action in accord therewith, such as replatting the properties into one lot or requiring that a restrictive servitude be recorded.

In light of the totality of the preceding analysis, the Court finds the Board abused its discretion in conditioning approval of Polanski's Application on the acquisition of TDRs for Current Lot 16. Pursuant to C.R.C.P. 106(a)(4), the Board's determinations in Resolution Nos. 2007-16 and 2007-63 in that regard are hereby **REVERSED**.

II. The Board's Consideration of the Applicable Master Plans

The foregoing discussion of equitable estoppel, by itself, merits reversal of the Board's determinations. Equitable estoppel was the Board's primary consideration in handling Polanski's Application, and its misapplication under the prevailing factual circumstances was therefore the Court's principal reason for reversing the Board. Nevertheless, the Court goes on to address the Board's consideration of the applicable Master Plans on an alternative, separate, and independent basis.

At the outset, the Court notes the Board's concern over the issues which the Court raised in its requests for supplementation, as well as the Board's argument that the Court cannot address those issues in light of Polanski's failure to specifically address them.¹⁴ The Court finds that it is proper to consider the issues raised by supplement. First, as noted in the October 23 Request:

In exceptional circumstances . . . appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Moody v. People, 159 P.3d 611, 615 (Colo. 2007), *citing U.S. v. Atkinson*, 297 U.S. 157, 160 (1936). On a C.R.C.P. 106(a)(4) proceeding, a district court sits as an appellate court. *See Save Park County v. Bd. of County Commissioners of County of Park*, 969 P.2d 711, 713 (Colo. App.

¹⁴ The Board cites *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714 (Colo. App. 2008) in support of its contention that the Court cannot address issues not raised by Polanski. The Court finds *IBC* not to apply to the situation *sub judice*.

In *IBC*, the challenging plaintiff did not address all of the reasons underlying the decision reached by Wheat Ridge. Instead, the plaintiff challenged only the reviewing trial court's reasons for affirming Wheat Ridge's determination. As the Court of Appeals, on a 106(a)(4) proceeding, sits in the same position as does a trial court, the *IBC* Court determined that it was incumbent on the plaintiff to challenge the determination of the agency, as opposed to the determination of a reviewing court. Thus, *IBC* stands for the principle that the plaintiff must challenge the alleged wrongful determinations of the original body, as opposed to the allegedly wrongful determinations of a reviewing court.

1998) (“C.R.C.P. 106(a)(4) contains a procedure for appellate review by the district court”), *aff’d* 990 P.2d 35.

The Court finds the noted issues are anything but insignificant. Polanski and the Board’s briefs required the Court to review the applicable regulations and the various master plans in detail. In doing so, the issues of whether the Board correctly applied its own regulations and the various Master Plans were immediately apparent. The Court has a duty to ensure that justice is done; it is in the interests of justice that an obvious issue not be glossed over simply because a party has failed to address it in sufficient detail.¹⁵ The Court read the briefs, reviewed the record and the law, noted the issues, and gave the parties the opportunity to brief them. This has allowed the parties the opportunity to be heard, and has enabled the Court to make a more informed ruling.

Further, the Board has not drawn the distinction between issues of fact and issues of law. The Board is correct that, absent a lack of support in a record, a reviewing court must defer to the lower agency’s determinations of fact. As set forth in more detail below, however, a reviewing court is under no obligation to defer to a lower agency’s interpretation or application of its own rules or the law when such has no reasonable basis in law. The issues raised by this Court in its requests for supplemental briefing are not issues of fact, but are in this Court’s opinion, issues of law.

The Board also argues that a reviewing court should limit its review to what is contained in the record. As a general matter, this is correct. It is not, however, a requirement that a reviewing court ignore obvious, non-factual, issues that were not addressed below. To hold

¹⁵ Note also the C.R.C.P. 54(c) requires the Court to provide relief that is appropriate under the law, regardless of how a case is pled.

otherwise would allow or condone misapplications of the law simply because a governmental agency did not mention the existence of an applicable law, rule, or constitutional concept on the record.

This Court will not enter a judgment, condone an incorrect decision, or create a precedent, when such would be contrary to the dictates of the law and when, as here, the issues are apparent to the Court and could potentially affect the community at large. Settled law, as provided in case law like *Moody*, clearly allows a reviewing court to address such issues.¹⁶

In creating Condition No. 4, the Board allegedly relied on its consideration of the applicable Master Plans and their provisions relating to density. The Board determined that the Countywide Comprehensive Plan (the “CCP”) and the Joint Upper Blue Basin Master Plan (the “JUBMP”), as supplemented by the Upper Blue Basin Master Plan (the “UBMP”), both required Polanski to acquire and dedicate three TDRs to the property in order to alleviate concerns regarding increased density.¹⁷

The relevant issues for the Court’s determination are: 1) the mandatory nature of the Master Plans; and 2) whether the Board’s interpretations of the Plans’ provisions have reasonable bases in law.¹⁸ The Court finds that the Board was required to consider the provisions of the Plans, but that the Board misinterpreted and misapplied its own regulations and the Master Plans, resulting in an abuse of discretion requiring reversal.

¹⁶ See also *Roberts v. Am. Fam. Mut. Ins. Co.*, 144 P.3d 546, 550 (Colo. 2006); *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984); *Slocum v. People*, 207 P.2d 970 (Colo. 1949); *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1008-9 (Colo. App. 2008).

Further, to the extent appellate rules of procedure are of guidance on a 106(a)(4) petition, the parties should note C.A.R. 1(d).

In the simplest terms possible, the authority of a court sitting in an appellate capacity to review errors which are not preserved, or even unaddressed, has existed for decades.

¹⁷ These three plans are collectively referred to as the “Master Plans,” or the “Upper Blue Plans,” as required.

¹⁸ In this regard, the Court hereby finds that the various Plans and their interpretations are issues of law, not fact – those plans are incorporated into the Summit County Code by the Code itself; the Plans are therefore law.

As a matter of generality, the CCP provides a framework for development across Summit County. Adopted in 2003, the CCP's primary goal is to maintain the presently rural character of Summit County while providing opportunities for development in areas that are better suited for it, such as Breckenridge or Frisco. The CCP is not specific to one area of Summit County – it is intended to provide a broad framework across the entire County.

The Upper Blue Plans, however, are more specific than the CCP. Geographically, they apply to the Upper Blue watershed, stretching from Hoosier Pass in the south to where the Blue River enters Lake Dillon to the north. The Upper Blue Plans therefore encompass the Towns of Blue River and Breckenridge, as well as the Silver Shekel subdivision, where Polanski's property is situated. The JUBMP was originally adopted in 1997, and was supplemented in 2005 with the UBMP.

A goal of the Master Plans is to preserve Summit County's rural character. An important provision in doing so is the TDR program. Summarized, a TDR is a development right that is transferred from an area in which development is to be discouraged to an area in which development is encouraged. For instance, and this is intended as an example only, a TDR could be transferred from a backcountry area in which development has not yet occurred to a built-out property in an urban location such as Breckenridge, in which development is encouraged. Once transferred, the rural parcel would lose the development right, but additional construction could be accomplished at the urban parcel. Thus, the rural area is preserved, yet development can continue in areas where development would have a lesser impact, even though that property might already be developed to the limit provided by the applicable zoning.

A. The Board Has Made Consideration of the Master Plans Mandatory; the Master Plans May Set Density in Derogation of the Applicable Zoning Designation

C.R.S. §30-28-106(3)(a) provides, in pertinent part, as follows:

(3)(a) . . . The master plan of a county [CCP] or region [Upper Blue Plan] shall be an advisory document to guide land development decisions; however, the plan or any part thereof may be made binding by inclusion in the county's or regions adopted subdivision . . . regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes as appropriate.

This statute establishes that, if it chooses to do so, a county may make its master plan(s) binding.

See also Bd. of County Commissioners v. Conder, 927 P.2d 1339 (Colo. 1996).

The Court finds that Summit County opted to make the provisions of the Master Plans binding. Summit County's code makes general conformance with the provisions of the Master Plans binding. *See* Summit Code, §2204 (certain proposals must be in general conformance), §8004.A (same). It would seem that the language of the Code is similar to the language of the Larimer County Code at stake in *Conder*, which the Supreme Court found to be mandatory. *See Conder*, 927 P.2d at 1346-47. Therefore, the Court finds that the Board had the authority to consider, and even require, compliance with the Master Plans.

Nevertheless, §8004.A of the Summit County Land Use & Development Code (the "Code") expressly provides, in pertinent part:

In determining if a proposed subdivision subject to this requirement is in general conformance with an applicable master plan, the Review Authority [the Board] shall respect the use and density provisions outlined in the underlying zoning to the maximum extent possible. In other words, the maximum density and the uses permitted for property shall continue to be set by the applicable zoning. Notwithstanding the foregoing, it is acknowledged and intended that the application of goals, policies/actions and other provisions contained in an applicable master plan during a subdivision application may affect and limit the type and density of land uses that may be located on the property.

The language presented by §8004.A is confusing, at best. On the one hand, it indicates that maximum density is to be in accord with the applicable zoning designation; on the other, it indicates that density may be limited by the applicable Master Plan. This creates a conflict.

The Court looks to §1201 of the Code to assist in a resolution. §1201 provides that, in cases of conflict, the more restrictive provisions are to govern.

Considering §1201, the Court makes the following finding regarding the foregoing excerpt from §8004.A. In light of the term “to the maximum extent possible,” it is the Board’s intent that density ordinarily be set in accordance with the Zoning Regulations. Nevertheless, it is also the Board’s intent that zoned density be abrogated when the CCP or basin plans require such an abrogation in order to achieve a goal or objective, and there is no way in which to achieve the goal or objective without said abrogation.

The Court hereby finds that the Board opted to make consideration of and compliance with the Master Plans mandatory. The Master Plans are incorporated into the Code. Regardless, the Board expressly opted to govern maximum density through the Zoning Regulations, except in cases where an applicable master or basin plan’s provisions or goals leave no choice but an abrogation of zoned density.

The Court discusses below that the CCP requires that density under existing zoning govern, and that the Upper Blue Plans, as they may not conflict with the CCP, also require that such density govern. These Master Plans do not call for an abrogation of density that is currently

zoned. Therefore, §8004.A requires that densities under existing zoning govern and, to the extent that the Board did not abide by this requirement, the Board abused its discretion.¹⁹

B. Interpretation of the Code and the Master Plans

The Court considers whether the Board's interpretations of its regulations and Master Plans have reasonable bases in law. Summarized, the Court finds that the Board's interpretations do not have reasonable bases, and that the Court thus owes the Board's interpretations no deference.

First, the Court sets forth and reviews the relevant provisions of the Code. The Court then sets forth the applicable provisions of the several Master Plans.

Second, the Court discusses the interpretation of the Code and of the Master Plans, and whether the Board's interpretations thereof have reasonable bases in the law, or whether such is fairly debatable.

1. *Provisions of the Code*

The Code allows for the CCP, as well as Basin Master Plans for the four designated river basins in Summit County. *See* Land Use & Dev. Code, §§2101, 2102.

The requirements for the CCP are set forth in §2201 – for purposes of this Opinion, suffice it to say that the CCP is, in accord with its name, designed to be the overarching guide for future development in Summit County; it is designed to provide policy guidance on the issues it addresses, including land use.

¹⁹ Note that the issue of the Board's interpretation of the Master Plans is independent from the issue of §8004.A discussed in this section – the Board's mistaken interpretation of the Master Plans is an independent and alternative ground for reversal under C.R.C.P. 106(a)(4).

The requirements for and contents of the basin plans are set forth by §2202, *et seq.* Summarized, the basin plans are to be plans more specific to Summit County’s several river basins, addressing issues unique to those areas. While §2202.02.A allows a basin plan to address basin-specific issues not addressed by the CCP, §2202.03.B provides that basin plans may not “directly conflict” with the CCP.²⁰

Among other proposals, a preliminary or final plat, or a lot line vacation, must be in “general conformance” with the CCP and basin plans. *See id.*, §8004.A; *see also* §8252.01.C., §8302.01.A. Regardless, as discussed previously, §8004.A provides that, unless abrogation of zoned density is necessary to achieve the Master Plans’ goals or policies, the Zoning Regulations are to set density.

2. *Provisions of the Master Plans*

As stated above, there are three Master Plans to discuss – the CCP, the JUBMP, and the UBMP. The Court sets forth the relevant provision of each.

Comprehensive Plan

The provisions of the CCP specifically regarding housing density and zoning are as follows:

For example, property that is zoned for a certain use (e.g., single family residential) can be developed for that use, provided the property owner adheres to applicable laws, such as building codes. This right to develop the land cannot be “taken” from the property owner, unless compensation is provided to the owner. There are certain avenues that a local government has (e.g., condemnation) that could potentially take away the right to develop.

...

²⁰ The Court does note that §2202.02.A allows a basin plan to address basin-specific issues not addressed by the CCP. As discussed *infra*, however, the CCP expressly mandates that existing density not be infringed – meaning that this is an issue addressed by the CCP which is not open for consideration by the basin plans.

The bottom line is that land zoned for a purpose can be built for that purpose. In Summit County, about 70 percent of our zoned land is already built That leaves approximately 30 percent still to be built. In other words, our landscape will experience a substantial additional amount of growth.²¹

This Land Use Element includes several policies aimed at limiting growth to acceptable levels, consistent with maintaining the County's character and sustaining our resources. One such policy restricts the creation of new density in the County. This policy is intended to recognize existing zoning and property rights, but to not allow for rezonings that would increase the amount of density allowed by today's zoning.

. . . .

The restriction on new density does not affect existing zoning. If a property is zoned for ten units, then development up to the ten units should be allowed (provided the applicant can comply with other applicable master plan policies and land use regulations). It should furthermore be recognized that some properties could be redeveloped or resubdivided in a manner that achieves a higher density than currently is developed on the property. For example, a one-acre parcel in the R-2 zoning district could be subdivided into two lots, consistent with the existing zoning.²²

Rezonings, PUDs, or PUD modifications that would result in higher residential densities or increased intensities of uses (*e.g.*, increased vehicle trips, increased square footage) compared to that allowed by existing zoning shall not be allowed in the County, except when one of the following is proposed:

1.1 Transfer of development rights (TDRs) are used to move density to the site proposed for rezoning.²³

. . . .

Joint Upper Blue Plan (1997)

The relevant provisions of the Joint Upper Blue Plan are as follows:

In implementing any action that may reduce approved densities, the community needs to recognize the legitimate rights of property owners. At the same time, property owners need to recognize the legitimate community values as expressed in this plan.

²¹ See *CCP*, pp. 11-12. Note that this excerpt is substantially more complete than that which was included in the January 8 Order for Supplementation.

²² See *id.*, p. 15. The bolded sentence is of particular relevance to the case *sub judice*.

²³ See *id.*, p. 18.

...

1. Additional density should not be created anywhere within the Upper Blue Basin, whether through upzonings, annexations, or some other mechanism.

...

2. No new density (beyond that currently zoned) shall be approved or allocated to any parcel within the basin unless such density is transferred to the proposed development site in accordance with the guidelines established pursuant to this plan. [] Rezoning or other actions which increase density beyond the level currently zoned should also require a transfer of development rights in accordance with this plan and subsequent policies established pursuant to this plan.

...

Strategies should be adopted which encourage and support reduction in approved development levels in order to move toward a desirable activity level at build out which is roughly equivalent to 75% of the projected full build out.²⁴

.....

Upper Blue Plan (2005)

Finally, the relevant provisions of the Upper Blue Plan are as follows:

Platted Residential Land Use Designation

Summit County first adopted zoning regulations in 1969. One of the issues related to this zoning action was the type of zone district designation that should apply to exist platted subdivisions. [] Because some lots in existing subdivisions were larger than other lots, this zoning application enabled further subdivision of some of these platted lots. For example, a one acre subdivided lot with R-2 zoning (two units/acre) could be allowed to be further subdivided into two half-acre lots.

...

Existing zoning and the legal ability of an owner of a platted lot to subdivide under that zoning should not be ignored. However, the long-term planning goal of the community is to avoid these further subdivisions, were possible. As such, the Plan suggests that subdivision-wide rezonings be initiated to eliminate additional density that could be subdivided in existing subdivisions. In order to accomplish this, a new Platted Residential zone district should be established, which recognizes existing subdivided lots and prohibits the further subdivision of existing lots.²⁵

²⁴ See JUBMP, pp. 11-12.

²⁵ See UBMP, pp. 3-4.

Resubdivision of Platted Lots

Some subdivisions created subsequent to the 1969 enactment of zoning . . . present similar issues in that some of the lot sizes in the subdivisions are large enough to be further subdivided, per the existing zoning. As the Plan was developed, the planning commission concluded that the reason some existing platted lots were not originally subdivided to their full zoning was because of environmental constraints or other site-specific limitations.

Further subdivision of these areas has the potential to impact the character of existing neighborhoods. Furthermore, a key goal expressed in the Joint Upper Blue Master Plan is to reduce the overall density in the basin. As such, the Plan includes policies designed to further scrutinize any proposed resubdivision of existing platted lots. The intent is to research historic records . . . to ascertain, if possible, reasons for the layout of the existing subdivision and the size of lots created (if the lots are twice or more as large as zoning would allow).²⁶

3. *Interpretation of the Code and the Master Plans*

The Court now sets forth the interpretation of the Code and the Master Plans. The Court first discusses the applicable standards of review, and then addresses the terms of the Master Plans.

a. Principles of Construction

The purpose of statutory construction is to give effect to legislative intent. *Granite State Ins. Co. v. Ken Caryl Ranch Master Ass'n*, 183 P.3d 563, 567 (Colo. 2008). A court should first look to the plain language of a statute. *Id.* When the language of a statute is plain and unambiguous, a reviewing court need look no further. *Id.*

If possible, a statute should be interpreted to give a consistent, harmonious, and logical effect to all its parts. *People v. Cooper*, 27 P.3d 348, 354 (Colo. 2001). If, however, a situation results in which one interpretation would result in conflict but another would not, the non-

²⁶ See *id.*, p. 4.

conflicting interpretation should be adopted. *In re Marriage of Ikeler*, 161 P.3d 663, 667 (Colo. 2007).

b. Interpretation

The Court starts with §8004.A, providing that the Zoning Regulations are to govern density, except when abrogating zoned density is necessary to achieving the goals and policies of the Master Plans.

Next, per §2202.03.B of the Summit Code, a basin plan may not “directly conflict” with the CCP. The Board devotes considerable argument to the meaning of this term, but the meaning is plain and in need of no elaboration. A conflict is a conflict – two terms either conflict, or they do not conflict; use of the term “direct” does not change this concept. The Court finds that the only reasonable interpretation that can be given to §2202.03.B is that a basin plan cannot negate, or be contrary to, a provision of the CCP – if there is such a provision in a basin plan, it cannot be given effect unless there is some manner in which to reconcile the conflict (meaning that any conflict would be neither a conflict nor direct).

The Court also notes §2202.02.A, which provides that a basin plan “may” address “goals and policies/actions” related to “basin specific issues” not already addressed by the CCP.

The plain meaning of these two sections of the Code indicates that basin plans are allowed to have unique policies for issues specific to a basin, so long as such an issue or policy is both unaddressed by the CCP and does not conflict with anything contained in the CCP. Further, the Zoning Regulations are to govern density for proposed subdivisions, except when abrogation is a necessity for accomplish the goals and policies of the Master Plans.

With these principles in mind, the Court addresses the terms of the CCP, the JUBMP, and the UBMP.

i. Comprehensive Plan

The CCP is plain and unambiguous. The CCP's terms, set forth above, indicate that the CCP is concerned with density. Nevertheless, it also requires preservation of the *status quo* in regard to currently zoned density. Measures taken to address such concerns are not to have an impact upon existing zoning, including density.

The CCP expressly recognizes the constitutional issues that could arise if the CCP were to infringe upon existing zoning rights.²⁷ This is an express indication that the CCP is not to be used to deprive property owners of existing rights, which includes the right to build to the zoned density.

The Board argues that the CCP's statement of "land zoned for a purpose can be built for that purpose" refers only to use and purpose, and that density is neither a use nor a purpose.²⁸ The Board argues that this recognizes "such revelations as *takings are not allowed* [emphasis the Board's]," but that it only applies to use and purpose.²⁹ Looking at both this section and the CCP *in totum*, the Court disagrees. First, while use and purpose are mentioned, this paragraph also refers to the right to develop, which in its commonly understood sense includes the right to develop a parcel in accord with applicable zoning which, per §8004.A, is to set density. Second, the very next paragraph further contemplates that 30% of available zoned density remains unbuilt, and that Summit County will continue to experience development in accord therewith –

²⁷ In fact, if the CCP were to provide otherwise, a takings issue could arise. The Court has an obligation to avoid creating constitutional issues if at all avoidable. *See Barber v. Ritter*, 196 P.3d 238, 254 (Colo. 2008). To adopt the Board's interpretation could raise issues under both the Colorado and United States Constitutions.

²⁸ *See* Board's Second Supp. Brief, p. 16.

²⁹ *Id.*

which is an express, and indisputable, indication that the CCP does not intend to interfere with that remaining 30% (which would include the unused density on Current Lot 16); in turn, that indicates that CCP is not to interfere with existing zoned densities.

Next, the CCP expressly states:

One such policy restricts the creation of new density in the County. This policy is intended to recognize existing zoning and property rights, but to not allow for rezonings that would increase the amount of density allowed by today's zoning.

...

This restriction on new density does not affect existing zoning. If a property is zoned for ten units, then development up to the ten units should be allowed (provided the applicant can comply with other applicable master plan policies and land use regulations). It should furthermore be recognized that some properties could be redeveloped or resubdivided in a manner that achieves a higher density than currently is subdivided on the property. For example, a one-acre parcel in the R-2 zoning district could be subdivided into two lots, consistent with the existing zoning.

This is plain and unambiguous; if anything, it is more so than the preceding section discussed by the Court. Existing densities and existing zonings, which are correlated in that zoning sets density, are not to be affected by the CCP. There is simply no other reasonable interpretation; to suggest otherwise would require disregarding the plain language of the CCP.

The Board makes the argument that the foregoing excerpt in fact allows for restriction of currently zoned density, despite the express statement that “this restriction on new density does not affect existing zoning.”³⁰ First, the Board claims that the statement regarding allowing development “up to [the zoned density] should be allowed” means that restricting density to anything less than the maximum is permissible³¹ – this contention is in contravention of the plain

³⁰ See Board's Second Supp. Brief, pp. 17-18.

³¹ See *id.*, p. 17.

language of the CCP and the Court does not address it further.³² Second, the Board claims that the parenthetical clause in the block excerpt above allows for density restriction by other Master Plan policies or land use regulations³³ – the Board is correct in this contention, but there are no other policies or regulations that allow for restriction of density for the sake of restricting density.³⁴

The Court accepts the Board’s representation in the last paragraph of p. 17 of its Second Supplemental Brief, which in turn references n. 4 of its First Supplemental Brief. In making this representation, however, the Board indicates that the CCP policies on density are “conservative,” a further indication that the CCP’s impact is, at best, limited.

ii. *JUBMP*

The JUBMP presents two problems for the Court. First, its terms are inconsistent with themselves. Second, certain of those terms are inconsistent with the CCP.

As set forth above, the JUBMP specifically states that “no new density (beyond that currently zoned) shall be approved or allocated. . . .” The plain language of this excerpt is clearly intended to mean that density currently allowed under the zoning code is excepted from the provision that no new density be approved, which is in accord with the CCP.

³² “Should,” as used in the CCP, is used as the future tense of “shall” from a point of view in the past. *See Webster’s*. Put plainly, the CCP provides that assuming compliance with other Master Plan policies (that do not conflict with the CCP) and regulations, density to the zoned maximum shall in the future be allowed.

³³ *See Board’s Second Supp. Brief*, p. 17.

³⁴ The Board undoubtedly looks to the provisions in the Upper Blue Plans that refer to restricting or limiting density. The Court discusses, *infra*, that such provisions will not be given effect – to do so would result in a situation in which the Upper Blue Plans would directly conflict with both themselves and the CCP, and could also result in constitutional takings issues.

Further, the Court has reviewed the entirety of the Code – there is nothing in the Code that allows for density restrictions simply for the sake of restricting density.

At the same time, the JUBMP also provides that “additional density shall not be created . . . [through any means],” and that growth should be limited to 75% of projected build out.³⁵ Both of these provisions unambiguously purport to limit densities allowed by the existing zoning.

Thus, the JUBMP creates two problems. First, its own terms conflict – it intends that existing densities under present zoning be allowed, yet it: 1) allows no new density at all; and/or 2) calls for a limit of 75% of currently zoned density.³⁶ Second, the provisions purporting to limit density conflict with the CCP’s requirement that there be no infringement upon existing allowed density.

The Board argues that there are no such conflicts, either within or without the JUBMP. In doing so, however, the Board expressly states “the persistent intent of the Upper Blue Plans is to reasonably restrict maximum buildout of density under existing zoning. . . .”³⁷ Without regard to whether the JUBMP conflicts with itself, this is a clear conflict with the CCP’s mandate that density under current zoning be allowed, impermissible under §2202.03.B; it also requires the Court to ignore that JUBMP’s own provision that existing density be allowed.

The Court hereby finds that to give effect to the JUBMP’s provisions that purport to restrict density to something less than what is allowed by existing zoning would negate the provisions of the CCP requiring that the density allowed by existing zoning be allowed. This would create a direct conflict – a provision of a basin plan negating a provision of the CCP

³⁵ The Court also notes that the Zoning Regulations refer to this density reduction in an unrelated section. *See* §3202.03.C.

³⁶ If current density is less than 75% of zoned density, a further conflict exists in that no new density is to be allowed, meaning that the 75% level could never be reached.

³⁷ *See* Board’s Second Supp. Brief, p. 20.

cannot be anything but a direct conflict. This is impermissible pursuant to §2202.03.B of the Code.³⁸

As the Board has not been able to do so, the Court is left in a position where it must attempt to reconcile the JUBMP with the CCP. To do so is simple; the first provision of the JUBMP discussed above provides that existing densities be recognized. This is consistent with the CCP, whereas the other two provisions of the JUBMP are not. Therefore, the Court will not give effect to those provisions of the JUBMP purporting to limit density to some level below that which is zoned – making the JUBMP consistent with the CCP.

iii. UBMP

There are two provisions of relevance in the UBMP – the “Platted Residential Designation” (“PRD”), and the provisions indicating that the JUBMP and UBMP provide for a reduction in density regardless of zoned densities. The Court addresses both provisions, and finds that both are equally invalid.

First, the PRD is a provision that the UBMP recommends be adopted as a zoning designation as part of the Zoning Regulations. As such, it is intended as an amendment to a zoning code. The Board, however, stipulates that the PRD designation is not currently a part of the Zoning Regulations.³⁹ Colorado law is specific on the issue of zoning amendments – such may be adopted only after the proper procedure is followed. *See* C.R.S. §30-28-116, *Raygor v. Bd. of County Commissioners of El Paso*, 21 P.3d 432, 436 (Colo. App. 2000) (strict compliance with, at least, statutory notice requirements is necessary). If the Board wishes to subject Summit

³⁸ The Board argues that there is not a conflict with the CCP because, to approve the JUBMP, the Board was required to find that the two plans were consistent. *See* Board’s Second Supp. Brief, pp. 13-14. To accept this argument would be to, *inter alia*, elevate form over substance.

³⁹ *See* Board’s Second Supp. Brief, p. 22.

County residents to the effects of a new zoning designation, it must comply with the necessary procedure to enact the same. The Court finds that it is inappropriate for the Board to have considered a proposed zoning amendment before formal adoption of the same in accord with the proper statutory procedures.⁴⁰

Further, the UBMP refers to reductions in density in reliance upon and furtherance of the JUBMP. For the same reasons as discussed in regard to the JUBMP, these provisions in the UBMP are invalid as conflicting with the CCP.

iv. Conclusion re: Interpretation of Plans

There is only one reasonable interpretation to reach regarding the effect of the CCP *vis-à-vis* density: the Zoning Regulations govern density. This is the clear intent, and express language, of the CCP.⁴¹

The Board, in arguing against this interpretation, has presented a variety of arguments that would require the Court to ignore the plain language used in the Master Plans. These arguments and the Board's proposed interpretations, however, have no reasonable bases in law – to adopt these interpretations would cause conflicts between the CCP and the Upper Blue Plans in contravention of §2202.03.B, and within the Upper Blue Plans themselves. Additionally, adopting these interpretations could also potentially create issues of constitutional proportions, which must be avoided if at all possible.

Therefore, the Court finds that the only reasonable interpretation of the Master Plans in regard to density and subdivisions is that the densities as allowed by the Zoning Regulations be

⁴⁰ The Courts of other States have reached the same conclusion regarding “*de facto* rezonings.” *See, e.g., Schwarz v. City of Glendale*, 950 P.2d 167, 171 (Ariz. App. 1997); *Vidal v. Lisanti Foods, Inc.*, 679 A.2d 206 (N.J. Super. Ct. App. Div. 1996). Based upon the need for compliance with statutory procedures, the Court is convinced that the law is the same in Colorado.

⁴¹ Further, it is in full accord with §8004.A of the Summit Code.

given effect. Therefore, the Court finds that the Board's interpretation has no reasonable basis in law and must be reversed. In conditioning approval of Polanski's Application on the transfer of three TDRs to Current Lot 16, the Board abused its discretion in failing to recognize that existing zoning allows for three more houses without the acquisition or application of additional TDRs.⁴²

CONCLUSION

The Court finds the Board abused its discretion in conditioning approval of Polanski's Application on the acquisition of three TDRs for Current Lot 16. Pursuant to C.R.C.P. 106(a)(4), the Board's determinations in Resolution Nos. 2007-16 and 2007-63 in that regard should be, and hereby are, **REVERSED**.

SO ORDERED this 29th day of May, 2009

BY THE COURT



Karen Ann Romeo
District Court Judge

⁴² In this regard, note that the Zoning Regulations only address TDRs in the context of zoning amendments – the Zoning Regulations are therefore not a source of authority for imposing TDRs on proposed subdivisions. The Subdivision Regulations are also not a source of authority for imposing a TDR requirement – the term is not mentioned therein.