DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Ave.; P.O. Box 597 Eagle, Co 81631 Phone: (970) 328-6373	FILED IN THE COMBINED CLERK'S OFFICE MAY 26 2017 DATE FILED: May 26, 2017 CASE NUMBER: 2016CV30361 EAGLE COUNTY, COLORADO BY: _____
Plaintiff: BARBARA AND JACK BENSON; CORDILLERA PROPERTY OWNERS ASSOCIATION, INC.; and CORDILLERA METROPOLITAN DISTRICT **v.** **Defendant:** EAGLE COUNTY, COLORADO, acting by and through its BOARD OF COUNTY COMMISSIONERS. **Intervenor:** BEHRINGER HARVARD CORDILLERA	**▲COURT USE ONLY▲** Case No.: **2016CV30361** Consolidated with 16CV30363 Div.: 1

ORDER GRANTING, IN PART, AND DENYING, IN PART, INTERVENOR'S MOTION TO DISMISS THE BENSON PLAINTIFFS' AMENDED COMPLAINT

THIS MATTER comes before the Court on Intervenor Behringer Harvard Cordillera's ("BHC") Motion to Dismiss Plaintiffs Barbara and Jack Benson's (the "Bensons" or "Plaintiffs") Amended Complaint. BHC filed the Motion to Dismiss on April 3, 2017 (the "Motion"). Plaintiffs' Opposition to Intervenor's Motion to Dismiss was filed on April 19, 2017. Intervenor's Reply in Support of Motion to Dismiss was filed on April 26, 2017.

Plaintiffs filed a Motion for Leave to File Sur-Reply on May 3, 2017. There was no objection to this Motion and the Court **GRANTS** Plaintiffs' Motion for Leave to File Sur-Reply.

The Court, having reviewed the record, the Motion, the Response, the Reply, and the Sur-Reply and being otherwise fully apprised of merits, makes the following Findings and Orders:

I. SUMMARY OF ISSUES

This case concerns a dispute about the correct interpretation of a 2009 Amendment to the Cordillera Planned Unit Development Guide (the "PUD") which the Defendant Eagle County, Colorado, acting through its Board of County Commissioners (the "BOCC"), determined allows for the requested redevelopment of the Cordillera Lodge.

Plaintiffs have raised a claim for judicial review under C.R.C.P. 106 and a claim for a declaratory judgment under C.R.C.P. Rule 57. Intervenor argues that both claims should be dismissed for reasons stated herein.

II. FACTUAL AND PROCEDURAL HISTORY

In 2009, BHC applied for an amendment to the Cordillera PUD. The BOCC approved the 2009 application and amended the PUD with a few modifications not pertinent here (the "2009 Amendment").

On July 11, 2016, Robert Narracci, the Planning Director for Eagle County (the "Director"), issued his Interpretation that the use of the Lodge Parcel as a clinic constitutes a use by right on both the Lodge Parcel and Village Center Parcel under the Cordillera PUD (as amended by the 2009 Amendment). This decision was appealed by the Cordillera Property Owners Association, Inc. ("CPOA") and the Cordillera Metropolitan District ("CMD"). A public hearing was held on September 20, 2016 where the public had the opportunity to be heard. The Bensons participated and presented their concerns.

The BOCC concluded that the 2009 Amendment substantially modified the Cordillera PUD to authorize the Lodge to be eliminated and replaced by any one of 34 so-called "standalone" uses, ranging from a medical facility, to an office building, a retail complex, a clinic or a parking garage. On October 11, 2016, the BOCC adopted Resolution 2016-079 (the "2016 Resolution") approving the application of the owner of the Lodge and Spa at Cordillera (the "Lodge") to eliminate the Lodge and replace it with a medical rehabilitation facility (the "Proposed Use"). The BOCC's decision is encapsulated in the 2016 Resolution. The BOCC based its determination in part on the Director's Interpretation of the 2009 Amendment.

Plaintiffs filed their original Complaint under C.R.C.P. 106 and C.R.C.P. 57 on November 8, 2016. Plaintiffs filed their First Amended Complaint on March 13, 2017.[1]

Plaintiffs' Rule 106 claim seeks judicial review of the 2016 Resolution. Plaintiffs allege that the BOCC abused its discretion and acted contrary to law when it upheld the Planning Director's Interpretation and adopted the Resolution. Plaintiffs request that the Court to reverse the BOCC determination approving the Director's Interpretation. Complaint, ¶ 69-71.

[1] Plaintiffs have filed a Motion for Leave to File Second Amended Complaint which adds a party, but does not change the allegations. This Motion remains pending.

Plaintiffs' Rule 57 claim requests that the Court declare "that, if the 2009 amendment to the Cordillera PUD was intended to modify the PUD to allow the Lodge to be replaced by any of 34 other 'standalone' uses, then that amendment is invalid, null and void . . ." Id., ¶ 75. Plaintiffs allege that the BOCC's interpretation of the 2009 Amendment is directly inconsistent with: 1) the official notice that the BOCC had sent to the community describing the purpose and effect of the 2009 Amendment; 2) the applicant's statement of the declared purpose of the 2009 Amendment; and 3) the applicant's and the BOCC's contemporaneous explanations for the 2009 Amendment; and 4) the overall scheme and purpose of the Cordillera PUD. *See* Opposition to Intervenor's Motion to Dismiss, p. 2. In the alternative, Plaintiffs ask the Court to declare "that the BOCC's approval of the Director's Interpretation and of [the Proposed Use] is in violation of the Cordillera PUD, ECLUR and state law and is therefore invalid." Id., ¶ 76.

It should be noted that the CPOA and the CMD filed a Complaint for Relief Pursuant to C.R.C.P. Rule 106 originally in Eagle County Case No. 2016CV30363. The two cases have been consolidated. These Plaintiffs only raise a claim for relief under Rule 106 related to the BOCC's 2016 interpretation and their claim is not part of the Motion to Dismiss.

Intervenor has moved to dismiss the Complaint on two grounds. First, the Intervenor contends that the Plaintiffs' claims for any relief under C.R.C.P. 106 is barred because the Plaintiffs failed to exhaust all available administrative remedies when it did not appeal the Director's Interpretation to the BOCC before filing their Complaint in this Court. Intervenor's Motion, at p. 2. Second, the Intervenor contends that Plaintiffs' claim under C.R.C.P. 57 is one seeking this Court's certiorari review of the BOCC's January 5, 2010 approval of an Amendment to the Cordillera PUD and that as such the claim must be brought under Rule 106, and even then, would be time barred. *Id* at p.7.

III. STANDARD FOR MOTION TO DISMISS, PURSUANT TO C.R.C.P. 57 AND C.R.C.P. 106

A motion to dismiss a complaint pursuant to C.R.C.P. 12(b)(1) or (b)(5) is grounded, respectively, on either the lack of jurisdiction or the failure to state a claim upon which relief can be granted. Both Motions serve to test the formal sufficiency of a plaintiff's complaint. *Denver Post Corp v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). A court reviewing to determine either must presume all of plaintiff's plausible factual allegations are true and construe them in the light most favorable to the plaintiff. *Warne v. Hall*, 2016 CO 50, 373 P.3d 588, at 590 (Colo. 2016)

(*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The standard is whether the complaint "contain[s] sufficient factual matter, accepted as true," to state a claim for relief "that is plausible on its face." *Warne id.* A claim has facial plausibility when its factual allegations assert an entitlement to relief definite enough to rise above a speculative level. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citation omitted). "Rising above a speculative level" in this context means that the plaintiff has pled facts that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and that there is a cognizable claim for which the Court could fashion a reasonable remedy. *Id.* at 1950.

In making this consideration, the Court assesses the complaint to ascertain whether the non-movant is making plausible or "naked assertion[s]" devoid of "further factual enhancement." *Iqbal id.*; *Warne id.,* at 595. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, are insufficient. *Iqbal, id.*, at 1940.

C.R.C.P. 106(a)(4) Review

Rule 106(a)(4) allows for a district court action, "[w]here any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law . . . ." C.R.C.P. 106(a)(4); *Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004). It is the exclusive remedy for reviewing a quasi-judicial decision made by a government entity. *Bd. of County Com'rs of Douglas County v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996).

Rule 106(a)(4) expressly limits judicial review to a determination of whether a governmental body exceeded its jurisdiction or abused its discretion. In determining that question, the district court sits as an appellate court, and considers the body's findings of fact and interpretation of law. *See Save Park County v. Bd. of County Commissioners of County of Park*, 969 P.2d 711, 713 (Colo. App. 1998); C.R.C.P. 106(a)(4).

The reviewing court may reverse the body's action if it has abused its discretion or exceeded its jurisdiction. C.R.C.P 106(a)(4). Courts generally deem the following to be an abuse of discretion by the governing body: 1) the failure to make findings of fact or conclusions of law necessary for a review of its action, C.R.C.P 106(a)(4)(IX); 2) the misapplication or

misconstruction of the applicable law, *Bd. of Cty. Comm'rs of Larimer Cty. v. Conder*, 927 P.2d 1339, 1343–44 (Colo. 1996); or 3) the failure to apply its own standards in rendering a decision. *Sherman v. City of Colorado Springs Planning Comm'n.*, 763 P.2d 292, 296 (Colo. 1988). The Court may remand or reverse as appropriate in any of those cases.

Any action for judicial review of a quasi-judicial decision must be brought with the time frame permitted by C.R.C.P. Rule 106(b) – 28 days. C.R.C.P. Rule 106(b); *see also JJR 1, LLC v. Mt. Crested Butte,* 160 P.3d 365, 369 (Colo. App. 2007).

C.R.C.P. 57 Review

Declaratory Judgments are governed by C.R.C.P. ("Rule") 57. Rule 57 provides in pertinent part:

> (b) any person interested under a deed... or whose rights status or other legal relations are affected by a statute, municipal ordinance . . . may have determined a question of construction or validity arising under the...statute, ordinance... and obtain a declaration of rights, status or other legal relation thereunder. . . . (f) the Court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered would not terminate the uncertainty or controversy giving rise to the proceeding.

Rule 57(b) and (f). While Rule 57 is to be construed liberally, it may not be improperly used to obtain the relief that should be pursued through other rules of civil procedure. Thus, an action for declaratory judgment pursuant to Rule 57 is appropriate only where certiorari review is unavailable or would not provide an adequate remedy for the claimant. *See Snyder v. City of Lakewood*, 542 P.2d 371, 375 (Colo. 1975); *Native Am. Rights Fund, Inc. v. City of Boulder*, 97 P.3d. 283, 287 (Colo. App. 2004).

IV. ANALYSIS

A. Plaintiffs' Rule 106 Allegations Are Not Barred For Failure To Exhaust Administrative Remedies

The Court is not persuaded that the Plaintiffs' C.R.C.P. Rule 106 claim is barred for failure to exhaust available administrative remedies. The exhaustion doctrine does not apply here as the Plaintiffs have an arguable injury in fact and the situation here fits squarely into one of the three exceptions to the doctrine.

Since the CPOA and the CMD did appeal the BOCC's approval of the Director's Interpretation to the BOCC, an administrative review process was triggered that resulted in the BOCC enacting the 2016 Resolution affecting all Cordillera property owners, including the

Plaintiffs. Additionally, the Plaintiffs personally participated in that review process, and testified at the subsequent hearing BOCC conducted. Five of the six questions raised here were presented to the BOCC. The remaining one was brought to the Board's attention but because of the BOCC's failure to answer, Plaintiffs' had no opportunity to air that concern during the time of the appeal.

The exhaustion doctrine is subject to three exceptions. As relevant here, when the administrative agency's review would be futile, exhaustion of administrative remedies is not required. *State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998). In light of the resort to administrative remedies by other, similarly situated parties, and the participation of the Plaintiffs in that appeal, any attempt to require Plaintiff to appeal again, would be futile.

Therefore, the Court finds the Plaintiffs' Rule 106 claim is not barred for failure to exhaust administrative remedies. *Golden, id.*; *See also, Friends of Mammoth v. Board of Supervisors*, 502 P.2d 1049, 1069 (Cal. 1972) (plaintiffs' challenge of land use permit need not exhaust administrative remedies by appeal to the county board where other similarly situated property owners did so unsuccessfully). *Accord, Cellnet Communications, Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir 1992).

During the BOCC appeal, CPOA and CMD stressed the need for the BOCC to ascertain the intent of that 2009 Amendment. *See* record citations for CPOA and CMD submission of September 12, 2016, at p.2. The Intervenor and Co-applicant, the Concerted Care Group, argued before the BOCC on September 12, 2016 that the 2009 Amendment had changed the Cordillera PUD to allow the Lodge to be replaced by one of thirty-four (34) standalone uses.

On October 3, 2016, the Cordillera parties argued that this has been raised for the first time and requested the opportunity to respond. Plaintiffs contend that the BOCC never responded, thereby precluding them from raising the 2009 notice issue in rebuttal. Plaintiffs' allege five of the six issues they raise in their Rule 106 claim were explicitly raised before the BOCC on administrative appeal. *See* Sur-Reply filed by Plaintiffs and the Micati, Hartman and Smith Affidavits referenced in Plaintiffs' Amended Complaint and Plaintiffs Sur-Reply.[2] The

[2] When the plaintiff attaches documents to the complaint, a court may consider those documents in addition to the allegations stated in the complaint. *Campaign Integrity Watchdog, LLC v. All. for a Safe & Indep. Woodmen Hills*, 2017 COA 22, ¶ 28, *reh'g denied* (Mar. 23, 2017)(citing *Lambert v. Ritter Inaugural Comm., Inc.*, 218 P.3d 1115, 1119 (Colo. App.2009).

record reflects that the Plaintiffs allowed the administrative process to run its full course before filing suit.

Where, as here, a suit does not frustrate any of the policies underlying the exhaustion doctrine – developing a full record, avoiding the fragmentation of the administrative process, and giving the agency an opportunity to correct errors, possibly conserving judicial resources – then further appeal is futile. *See United Air Lines*, 8 P.3d 1206 at 1213 (Colo. 2000). Because the record demonstrates the futility of further appeal, the Court finds Plaintiffs here were not required to formally exhaust administrative remedies before filing suit. *United Air Lines, id.*, at 1213 (Colo. 2000); *Condiotti v. Bd. of Cty. Comm'rs of Cty. of La Plata*, 983 P.2d 184, 187 (Colo. App. 1999).

B. Review of a Governmental Bodies' Quasi-Judicial Action May Not Be Commenced Pursuant To Rule 57

Intervenor argues that the Plaintiffs seek a ruling that BOCC review of the Director's Interpretation, too long after it developed a record, considered the issues, and issued a final decision in enacting Resolution 2009. The Court agrees and finds an attack on the adoption of the 2009 Resolution fails.

However, Plaintiffs now contend that despite the allegations in their Amended Complaint, their Rule 57 claim does not seek a declaration with regard to the 2009 approval of the PUD Amendment, but instead, seeks review of the interpretation that the BOCC gave the 2009 Amendment, allegedly for the first time when it adopted its October 11, 2016 Resolution. Plaintiffs seek a declaration that as properly interpreted, the Amended PUD does not allow the Proposed Use, and that this renders the 2016 Resolution invalid. There are several reasons the Court cannot agree this claim may properly be posed pursuant to Rule 57.

First, an action for declaratory relief pursuant to C.R.C.P. 57 is appropriate only where certiorari review is unavailable or would not provide an adequate remedy for the claimant. *See Snyder v. City of Lakewood*, 542 P.2d 371, 375 (Colo. 1975); *Native Am Rights fund, Inc. v. City of Boulder*, 97 P.3d. 283, 287 (Colo. App. 2004). Plaintiffs' Amended Complaint specifically requests that the Court declare the 2009 Amendment "invalid, null and void." *See* Plaintiffs First Amended Complaint § 75, and Prayer. This is a request for certiorari review and there is another remedy available pursuant to Rule 106(a)(4).

Rule 106(a)(4) provides the exclusive remedy for reviewing a quasi-judicial decision of a local government body. *Bd of County Comm'rs v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996). Plaintiffs do not contest that the action at issue is quasi-judicial. Accordingly, the only appropriate way to bring such an action is pursuant to Rule 106.

Plaintiffs have now framed their Rule 57 Motion as one for a declaration that the 2009 Amendment, interpreted to allow the Proposed Use, was first misinterpreted by the BOCC in October 2016 and contend that their Complaint, filed 28 days later, was therefore brought in a timely manner. To the extent that they are arguing that a misinterpretation occurred in October, 2016, this is appropriately framed under the Rule 106 claim for relief and is timely. As stated above, a review of a quasi-judicial decision must be sought under Rule 106(a)(4). The Plaintiffs have an existing Rule 106 claim related to the 2016 interpretation. Such a claim is not appropriately brought under Rule 57.

Plaintiffs also contend in their Response and Sur-Reply that they did not, and could not have, sought review of the language of the 2009 Amendment until the BOCC's January 5, 2016 "approval of [the 2009] Amendment to the Cordillera PUD," since that interpretation was "unknown until then." Plaintiffs' Response at p. 5. The Court disagrees with this conclusory argument. While it is not appropriately brought under Rule 57, it is also untimely even if brought under Rule 106.

First, as Defendant asserts, a property owner is deemed to have constructive notice of zoning provision applicable to its property when it is enacted. *See e.g. South Creek Associations v. Bixby & Assocs., Inc.*, 781 P.2d 1027, 1033-34 (Colo. 1989). Likewise property owners are deemed aware of all recorded provisions affecting their property. Defendant contends that in a real property disputes such as this, constructive notice of the BOCC's interpretation was sufficient to commence the running of an applicable statute of limitations, as this interpretation should have caused the Plaintiffs to inquire further in 2010. *See Bolinger v. Neal*, 259 P.3d 1259, 1269-70 (Colo. App. 2010). The Court agrees.

Plaintiffs assert equitable tolling, arguing that it was the BOCC's actions that created their inability to contest this interpretation any earlier. The Court disagrees.

The time limit for bringing a Rule 106 action is considered jurisdictional and cannot be tolled or waived; the court has no authority to create even an equitable exception to a

jurisdictional requirement.[3] *See Bowles v. Russell*, 661 U.S. 205, 214 (2007); *Slaughter v. Cnty. Court*, 712 P.2d 1105, 1106 (Colo. App. 2015). The Rule 106 jurisdictional filing deadline is 28 days from the date the injury or conduct accrued. C.R.C.P. 106(b). A Rule 106 complaint that is not filed in the district court by the twenty-eight day jurisdictional deadline must be dismissed for lack of subject matter jurisdiction. *Maslak v. Town of Vail*, 345 P.3d 972, 976 (Colo. App. 2015).

Plaintiffs contend their claim was filed as soon as it was discovered, since there was "no indication earlier that [the 2009 Amendment] would be interpreted in a manner that would allow the Lodge to be eliminated and replaced with other uses." Plaintiffs' Response to Motion, p. 9. Plaintiffs rely heavily on C.R.S. § 13-80-108(8) to defensively invoke the "discovery rule" to postpone the claim accrual date. The Court finds that argument unpersuasive.

The discovery rule provides that a cause of action accrues when the injury or conduct giving rise to the action "is discovered or should have been discovered by the exercise of reasonable diligence." Plaintiffs, as property owners, are charged with the knowledge of the contents of the zoning provision at the time it was passed and when it is recorded, whether they bring this claim under Rule 57, or, more properly, under Rule 106 as the claim contests a quasi-judicial action. *See Tri–State Generation & Transmission Co. v. City of Thornton,* 647 P.2d 670, 676–77 (Colo.1982) (quasi-judicial decision may not be brought through a declaratory judgment). Under that view, Plaintiffs' complaint is untimely, since the BOCC's action was taken in 2009 and published no later than 2010 as Plaintiffs' original and First Amended Complaint allege.

Plaintiffs' new argument, even if their Amended Complaint were amended again to add it, simply isn't plausible given Plaintiffs constructive knowledge of the content and legal import of the 2009 Amendment at the time it was made in 2009, and no later than when it was made of record in the 2010 Resolution. Therefore, the Court need not and does not accept Plaintiffs' proffered allegations in its Response as true. *Warne, id.* The time for review of the adoption of the 2009 Amendment, whether framed as a Rule 106 issue or a Rule 57 issue, has passed. Again,

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[3] Even if this argument were analyzed pursuant to Rule 57 the result would not change as Rule 57 requires use of the Rule 106 (b) deadlines when the action complained of is quasi-judicial action. *JJR 1 LLC v. Mt. Crested Butte*, 160 P.3d 365,369 (Colo. App. 2007); C.R.C.P. 106(b).

judicial review of the 2016 interpretation of 2009 Amendment is timely but it is appropriately considered as part of the Rule 106 relief. It is not appropriately sought under Rule 57.

V. ORDERS

Intervenor's Motion to Dismiss is **DENIED, IN PART, AND GRANTED, IN PART**, as follows:

1. Intervenor's Motion to Dismiss is **DENIED** as to Plaintiffs' first claim for relief.
2. Intervenor's Motion to Dismiss is **GRANTED** as to Plaintiffs' second claim for relief which is hereby **DISMISSED**.

SO ORDERED and dated this 25 day of May, 2017.

BY THE COURT:

Paul R. Dunkelman
District Court Judge