DISTRICT COURT, **MINERAL COUNTY, COLORADO** Mineral County Courthouse North First Street Creede, CO 81130 Phone: (719) 658-2575	
PLAINTIFFS: **Wolf Creek Ski Corporation, Colorado Wild, Inc.** and the **San Luis Valley Ecosystem Council** **v.** **DEFENDANT**: **Board of County Commissioners of Mineral County; Leavell-McCombs Joint Venture**	
	▲COURT USE ONLY▲
	Case Number: **2004CV12;** (consolidated with **2004CV13**) Div: **2** Courtroom:

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REMANDING THE MATTER TO THE BOARD OF COUNTY COMMISSIONERS

This consolidated matter came before the Court on actions filed by Plaintiff Wolf Creek Ski Corporation ("Wolf Creek") and Plaintiffs Colorado Wild, Inc. and the San Luis Valley Ecosystem Counsel ("Colorado Wild" or "CW") pursuant to C.R.C.P. 106(a)(4). Colorado Wild, Inc. and the San Luis Valley Ecosystem Council are represented by Anna Ulrich and Jeffrey Parsons. Wolf Creek Ski Corporation (a Colorado Corporation) is represented by Andrew Shoemaker, Andrew Spielman and Jacqueline S. Cooper, all of Hogan & Hartson L.L.P. Leavell-McCombs Joint Venture is represented by Josh Marks and Michael Wussow, both of Berg Hill Greenleaf & Rusetti L.L.P. Mineral County and its Board of County Commissioners are represented by Richard J. Jacobs.

The Plaintiffs have appealed the final approval by the Defendant Board of County Commissioners of Mineral County ("Mineral County" or "Board") of development plans submitted by Defendant Leavell-McCombs Joint Venture ("Leavell-McCombs," "Joint Venture" or the "Developer"). The parties have fully briefed the matter. The Court heard oral argument on July 26, 2005. The Court has reviewed the extensive record, the briefs and proposed orders and enters the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. The Joint Venture originally obtained a 300 acre tract surrounded by National Forest Land and abutting the Wolf Creek Ski Area from the United States Forest Service on May 14, 1987, pursuant to a land exchange. *See* Record at R415-426. R2432. The land exchange was applied for by the Joint Venture in 1984. *See* Record at R2331-R2332.

2. The Joint Venture plans to develop its land into the "Village at Wolf Creek" ("Village" or "Development"). The proposed Development will be situated entirely within the area Wolf Creek operates pursuant to a USDA-Forest Service permit. *See* Wolf Creek Exhibit WC-8 (admitted to the Record by Order of this Court on July 22, 2005). An overview of the Village is depicted in Exhibit 2, Figures 2 & 3.

3. As a condition to the 1987 land exchange, the Joint Venture granted the Forest Service an easement over the property for the continuation of use by the public of former FSR 391 across the Village property to access adjacent public lands (the "FSR 391 Easement"). *See* Record at R427-R432.

4. The Joint Venture entered into an agreement with the Forest Service known as the FSR 391 Easement. In the agreement, the Forest Service covenants, "to regulate the use of this Easement by the public to prevent and control unreasonable traffic, noise, dust, litter, and other interference with the Joint Venture's use and enjoyment of the Property." Record at R427. The "Property" as used therein refers to the 300-acre tract then owned entirely by the Joint Venture. Record at R427, R431. The Joint Venture subsequently conveyed 12.5 acres of the 300 acres obtained in the land exchange to Wolf Creek. Record at R848. The Joint Venture still owns the remaining 287.5 acres.

5. Also as a condition to the 1987 land exchange, the Joint Venture together with Kingsbury Pitcher, Charity Pitcher, and Wolf Creek granted the Forest Service a scenic easement, which was amended on December 11, 1998 (the "Amended Scenic Easement"). Record at R433-R439. The Amended Scenic Easement grants the Forest Service certain rights to ensure that the 300 acres obtained by the Joint Venture in the land exchange is developed in a manner that is compatible with the surrounding Forest Service land and the Ski Area. Record at R433.

6. On August 24, 2000, the Board approved the Developer's Preliminary Development Plan for the development. The plan was approved by Resolution #2000-13 ("Resolution #2000-13"). Record at R1-R39. Wolf Creek, together with Kingsbury and Charity Pitcher, supported and signed their approval of the Preliminary Development Plan. *See* Record at R36. The purpose of Board review of a preliminary development plan is to evaluate the feasibility of a proposed project at an early stage. *See* Record at 12, § 2.2.

7. The Preliminary Development Plan approved the PUD, but imposed conditions precedent to the approval of the Final Development Plan. *See* Record at R8, § 2.1. The Preliminary Development Plan gave approval for a number of matters, including parking requirements (Record at R9, § 2.2.2); use restrictions and densities (i*d.*, § 2.2.3); Village at Wolf Creek Property Owners' Association (the "POA") and the Mutual Water Company for the Village (the "Water Company") ownership, operation, maintenance, repair and replacement of the infrastructure for the Village (Record at R17, § 4.4); geotechnical engineering and geologic hazards, based on preliminary reports (Record at R20, § 4.6.12); and location of internal roads, streets, and alleys (Record at R21, § 4.6.17).

8. The Preliminary Development Plan contemplates a series of future Board approvals after the grant of the initial approval of the Preliminary Development Plan. The first subsequent level is approval of the Final Development Plan (as defined by Resolution #2000-13), the Final Plat (as defined by Resolution #2000-13), and associated documents. Record at R6-R7, § 1.3.5. The Preliminary Development Plan also contemplates separate Board approvals for each phase of the Village project, pursuant to an Application for Designation of New Phase "ADNP." Record at R2-R4, § 1.3.1. The "Final Approval" is defined in the Preliminary Development Plan and is considered to be approval of the Final Development Plan, the Final Plat, the ADNP for Phase 1, and certain other documents. Record at R6-R7, § 1.3.5. It is also contemplated that each ADNP will be presented to the Board for approval consistent with the process set forth in the Preliminary Development Plan. The ADNP approval for Phase 1 allows the Joint Venture to proceed with the construction of the infrastructure to support Phase 1. The Joint Venture is not authorized to sell lots or blocks upon the Board's issuance of the Final Approval or ADNP approval for any phase. *See* Record at R19, § 4.6.3; *see also* Record at R1044-R1045, § 4.6.3. The Joint Venture must thereafter obtain another level of Board approval for each phase before it is authorized to sell lots and blocks. The approval comes in the form of a Supplemental Resolution which requires satisfaction of numerous conditions contained in the ADNP approval.

9. Pursuant to the Preliminary Development Plan, each ADNP must include:

> The external boundary of the new phase, in words following platted lines; A copy of the Final Plat showing the new phase and showing central on-site and off-site parking; A list of the lots, blocks, open space parcels, roads, streets and alleys located within the new phase; A comprehensive and itemized list of all of the infrastructure that must be purchased or constructed, including on-site parking facilities not located on private properties and off-site parking facilities, with current costs of purchase and construction for each item, prepared by a registered engineer and certified to and for the benefit of the County by that engineer; Based upon that list, a proposed Subdivision Improvements Agreement for the completion of the entire infrastructure of that new phase; A detailed description of the security offered to secure the performance of that Agreement and the completion of the infrastructure for that new phase; All use densities within

> the new phase, lot by lot and block by block; All density transfers within the new phase; All density transfers to or from other areas of the Development involving the new phase; A compilation of the status of all density transfers to date, including the total reserved from all prior phases and all density borrowed from future phases; All parking requirements within the phase and the location, type and size of parking to be constructed, both on-site and off-site, to meet those requirements; All cumulative parking requirements to the date of filing of the ADNP; A description of the parking structures and capacities satisfying those requirements.

Record at R2-R3, § 1.3.1.

10. In connection with each ADNP, the Joint Venture must also provide the County with a number of letters from engineers and other experts, which letters must be certified as being "to and for the benefit of the county." Such certified letters include the following: (1) from a registered engineer certifying the amount of water rights that must be conveyed to the Water Company to support all of the needs of that new phase; (2) from a registered engineer certifying the amount of additional water and sewage treatment capacity that must be created and the buildings, tanks, lines, pumps, equipment and easements that must be constructed, purchased and installed to support all of the needs of that new phase and certifying that the itemized list presented with the ADNP includes all of the components necessary to create that additional capacity and deliver the services to each lot line; (3) from a competent, trained professional in the field of emergency medical services and fire protection and fire fighting services certifying the minimum number of EMTs and basic medical equipment and vehicles and the minimum amount of fire fighting equipment and vehicles (for the Village development and not for the National Forest) reasonably necessary to protect the people and property in the Village development after full build-out of the new phase and that such items and the costs are included in the itemized list; (4) from a registered engineer certifying that adequate electricity is available to furnish all of the cumulative needs of the POA, the Water Company and the private properties within the new phase and all prior approved phases, at peak times and after full build-out or, in the alternative, by including all upgrades and costs necessary to acquire such electricity and deliver it to each lot line, in the comprehensive and itemized list referred to above; and a list of any parcels, lots, blocks, open space and easements within the new phase that were not conveyed to the POA or the Water Company or to an electric utility at the time of Final Approval and now must be conveyed to the POA or the Water Company or to an electric utility.

11. Pursuant to the Preliminary Development Plan, Joint Venture must thereafter satisfy numerous requirements before a Supplemental Resolution is approved by the County authorizing the sale of lots and blocks in an approved designated phase. *See* Record at R4-R5, § 1.3.3; *see also* Record at R1001-R1002, § 3.2.1; Record at R1030-R1031, § 1.3.3. These requirements include: (1) completion of at least one-half of the infrastructure for the phase; (2) a certified statement by a

Registered Professional Engineer that the infrastructure has been completed in accordance with all applicable laws; (3) a certified statement by a Registered Professional Engineer that the sewage treatment system has been adequately completed and is capable of handling the cumulative sewage to be generated in connection with the phase; (4) a certified statement by a Registered Professional Engineer that potable and fire fighting water systems have been completed and are capable of handling the cumulative needs in connection with the phase; (5) a certified statement by a Registered Professional Engineer that the necessary water rights and water and sewer easements have been obtained and conveyed to the Village property owners' association; (6) a certified statement by a Registered Professional Engineer that all necessary easements, equipment, and elements of the infrastructure have been been conveyed to the Village property owners' association; (7) a statement by a competent, trained professional in the field of emergency medial services and fire protection and fire fighting services stating that the facilities, equipment, and personnel reasonably necessary to provide such services are now on the Village and that the facilities and equipment have been conveyed to the Village Property Owners' Association; (8) a certified statement by a Registered Professional Engineer that the electricity available to the Village is cumulatively adequate and adequate for each lot and block; (9) original permits, licenses and approval letters issued by any state or federal activity in conjunction with such phase; (10) a written statement by the Joint Venture attesting that (a) the requisite infrastructure is complete, (b) the phase property, other than single-family residential, is complete, (c) each and every element of the infrastructure complies with all applicable laws, (d) all costs and fees of every contractor, engineer, architect, etc. have been paid in full and there are no mechanic's liens or purchase money liens in place (or if a dispute has been filed, the Joint Venture has filed a bond to satisfy the full amount of the lien), (e) the infrastructure has been conveyed to the Village Property Owners' Association, and (f) all conditions precedent to the adoption of the Supplemental Resolution have been complied with. *Id.*

12. The Joint Venture submitted its request for approval of the Final Development Plan on June 4, 2004. Record at R995, R1940. An initial version of the "Final Plat" was submitted at the same time. The Planning Commission considered the request at its July 15, 2004 meeting. Although no notice had been published announcing this would be discussed, both Wolf Creek and Colorado Wild were present and participated with public comment on the Final Development Plan. Record at R2158-2302. The Planning Commission voted to recommend approval of the Final Development Plan but later realized that it should provide published notice of a hearing on this matter.

13. The Planning Commission therefore set a public hearing on the Final Development Plan for September 16, 2004, and published notice of this hearing three times in the Mineral County Miner. The hearing was more than fifteen days after the third publication. Record at 1919-1924.

14. The Planning Commission held the hearing September 16, 2004. The Final Development Plan, Final Plat and ADNP for Phase 1 were all discussed.

Considerable public comment was made, including comment from Wolf Creek and Colorado Wild. Record at R2206-2407. The Planning Commission was presented with changes in the proposed plat by the Joint Venture and decided to continue the hearing to allow further review of the changes and further comment. Record at R2356-2357, 2410-2411, 2211-2212. The hearing was continued to October 21, 2004.

15. The Planning Commission published notice of the continuation of the hearing two times on September 30 and October 14, 2004. Record at 1903-16. At the continued hearing addressing Final Development Plan, a revised version of the Final Plat and the ADNP for Phase 1, the Planning Commission heard additional public comment from both Wolf Creek and Colorado Wild. Record at R2178-21. Extensive written comment was also submitted to and accepted by the Planning Commission. Record at R1429-1572. The Planning Commission considered the matter and recommended, in writing, approval of the Final Development Plan to the Board. Record at R2189-2201; R4302-4307. It also recommended approval of the Final Plat and ADNP Phase 1. Record at R2189-2201.

16. The Board set a public hearing for consideration of the Final Development Plan for October 26, 2004. On September 23, 2004, and October 7, 2004, Mineral County published notice in the Mineral County Miner and the Pagosa Springs Sun of the public hearing scheduled on the Final Application. Record at R1458-61, 1462-8. The notices published by the Board on September 23, 2004, and October 7, 2004, each stated that the Board would "consider the Final Plat and Final Development Plan" for the Village at the public hearing on October 26, 2004. Record at R1459-61, 1467. The notices also stated that the Developer had "submitted a Final Plat," that "may be examined" at the office of Mineral County's Land Use Administrator. *Id*. Record at R1459-1467. Obviously, the idea was to have a month between the Planning Commission hearing and the Board hearing. As a result of the continuance of the Planning Commission hearings, the Board met only five days after the Planning Commission completed its review.

17. On October 26, 2004, the Board considered the Final Development Plan and Final Plat. It announced it would consider the ADNP for Phase 1 on November 1, 2004, at its next regular meeting. The Board heard considerable public comment at the meeting including oral and extensive written comment by Wolf Creek and Colorado Wild. Record at R2457-2545; R1231-1568.. At the conclusion of the meeting, the Board approved the Developer's Final Plan and Final Plat for the Village by Resolution #2004-21. The Board also announced it would consider the ADNP Phase 1 at its regularly scheduled meeting on November 1, 2004.

18. Many people appeared to observe and comment on the proposals to the Board. While not everyone was able to fit in the small courtroom in Creede, the record shows that everyone who wished to comment or submit written comment was permitted to do so.

19. Comments extensively addressed the wisdom of allowing this development at all, concerns over what would happen if the development is started and fails, the adequacy of the water supply, the maintenance of stream flows, treatment of waste water, snow removal and storage, compatibility of the development with the Ski Area, the need for new jobs and a desire to get on with it--among many more.

20. It is evident in the record that the Planning Commission, the Board, the county attorney and county administrator had spent a great deal of time doing their "homework" for consideration of these proposals.

21. It is equally evident that representatives of Wolf Creek and Colorado Wild and other members of the public had also studied the proposals and made thoughtful and helpful comments.

22. The modifications to the plat as it progressed through the hearings was frustrating to the Plaintiffs and aggravated the already existing tensions between the various interested parties.

23. The Final Plan provides for 2,200 residential units, over 500,000 square feet of commercial space, and up to 10,000 inhabitants. *See* Record at R878-81. The density after final build-out in the Final Plan is essentially the same as in the Preliminary Plan, and the Equivalent Residential Unit (EQR) calculated by the water engineer for the Final Plan is indistinguishable from the EQR set out in Table 1 of the Water Decree in 1987 CW 7, Water Division 3, which adjudicates the water rights related to the Village and the Wolf Creek Ski Area.

24. The ADNP for Phase 1 was submitted to the Planning Commission and Board on June 4, 2004. Record at R995, R1940. As outlined above, it was considered by the Planning Commission on three occasions, and the Board heard comment on it at its November 1, 2004, meeting. Record at R2169-2581. Wolf Creek and Colorado Wild were present and commented. Record at R 2169-70, R 2557-2581. The Board approved the ADNP for Phase 1 at the meeting. Record at R1006-1009, R. 2585-2586. The ADNP-Phase 1 authorizes the Developer to begin construction and includes important information such as the boundaries, the Final Plat, the parcels to be developed, the cost of infrastructure, the SIA, density, water rights, sewage treatment, and many other important issues. Record at 2-4 § 1.3.1.

25. Sections 1.3.5 and 4.6 of Resolution #2000-13 required the satisfaction of certain conditions prior to the Board's approval of the Final Development Plan, Final Plat, and Application for Designation of New Phase for Phase 1. Record at R1, R18.

26. Section 4.6.11 in Resolution #2000-13 sets out the requirements for access to the state highway and road access across Forest Service lands necessary for the Development. Record at R20.

27. The potential delay in the resolution of state highway access and access across Forest Service lands was the basis for section 2.7.3 of Resolution #2000-13, which permitted annual extensions of time to submit a Final Development Plan and seek Final Approval. Record at R11. Section 2.7.3 of Resolution #2000-13 permits annual extensions of time to submit a Final Development Plan and seek Final Approval. Record at R11. Section 2.7.3 provides a mechanism for allowing the Developer additional time to resolve access issues (specifically, litigation and permitting issued preventing resolution of access) prior to seeking final approval. Record at R20.

28. The Joint Venture has sought and obtained extensions pursuant to Section 2.7.3. The first such request expressly acknowledged that Resolution #2000-13 "required that the Applicant obtain all governmental and third-party approvals and agreements required by law and the Resolution as a condition to the Final Plat approval, and these approvals would include : (2) Appropriate agreements with the ski corporation with regard to the access road; (5) Approval by United States Forest Service of Permanent Access Road Easement to provide year round ingress and egress and utility easements to serve the Village at Wolf Creek; and (7) Obtain permanent access road easement from [State Highway] 160 to Village at Wolf Creek and any required CDOT highway access permits." Record at R3217-18.

29. To access the Village property from State Highway 160, the applicant must cross over Forest Service land. Record at R1124.

30. The Joint Venture and Wolf Creek executed an Easement Grant and Agreement (Village Access Road Easement) dated July 13, 1999, and apparently executed by Kingsbury Pitcher on behalf of Wolf Creek. (Record at 76-88). An Agreement for Ski, Utilities, Road and Parking Easements for the Village at Wolf Creek, dated July 16, 1999, and also signed by both the Joint Venture and Wolf Creek was also executed. (Record at R89-106). Access from State Highway 160 to the Village property as contemplated in these agreements has not occurred and is the subject of litigation.

31. Forest Service Road 391 ("FSR 391") currently connects the Village property to State Highway 160. FSR 391 has a number of limitations. These limitations include the following:

a. The road is closed during the winter due to snow accumulations and Wolf Creek Ski Area operations; Record at R258, R1450, R1486;

b. When closed, the road is open only to foot traffic; Record at R1450, 1486;

c. The road is single lane and gravel, and no reconstruction of FSR 391 is authorized by the Forest Service; Record at R258, R1450, R1486;

d. The road is subject to an easement that requires the Forest Service to regulate the use of the road by public "to prevent and control unreasonable traffic, noise, dust, litter, and other interference with" use of the property by Leavell-McCombs, Wolf Creek Ski Area, and the public. Record at R427, §§ 1.2.4.

32. FSR 391 crosses Wolf Creek ski trails, skiable terrain, and property within the Development area owned in fee by Wolf Creek. Record at R1408; see also Wolf Creek Exhibit WC-8 (Admitted to the Record by Order of this Court on July 22, 2005).

33. There is no record evidence of any motorized access for Leavell-McCombs during the winter months when FSR 391 is closed due to snow accumulation and Wolf Creek ski area operations.

34. Resolution #2004-21 provides that "the Developer shall be required to mitigate the impacts arising from the legal and practical limitations of U.S.F.S. Road 391, including the purchase and conveyance to the POA without charge of vehicles capable of providing solid waste disposal, emergency medical services, law enforcement services and LNG services, with or without snow removal." Record at R1124, section 4.6.11.

35. The Joint Venture has applied for a permit from the Forest Service for an access road from State Highway 160 to the Village property. The Joint Venture previously obtained extensions of time to submit plans for Final Approval so that it could obtain such a permit prior to seeking Final Approval from Mineral County. Record at R3065, R3074. To date, the Forest Service has not granted the Joint Venture a permit.

36. In January 2001 and March 2004, the Colorado Department of Transportation informed Mineral County that the proposed Development would "require an Access Permit" and further analysis. CDOT stated that, "until an exact arterial system is identified and any access issues resolved, we do not recommend final approval of the proposal". Record at R3212, R3047.

37. In approving the Final Development Plan, Mineral County found that legal access was resolved through FSR 391 and therefore meets the requirements of Resolution #2000-13. (Record at R750, R1928, R2235-336, and 2438-39). However, Section 4.6.11 of Resolution #2004-21 acknowledges that meaningful access to the Village as proposed has not been resolved:

> In as much as the Development does not access a county road, the County has no authority to regulate this subject. State highway access is controlled by and shall be resolved by compliance with state laws, rules and regulations. Access across Forest Service Lands, between the state highway and the Development is currently over U.S.F.S. Road 391 and is controlled by compliance with federal laws, rules and regulations. If

> approved by the U.S.F.S., an alternative access road or roads shall be constructed by the Developer in accordance with federal requirements and such road(s) and all rights and obligations with respect to such road(s) shall be assigned and otherwise conveyed and transferred to the POA without charge. . . . No Supplemental Resolution shall be adopted for Phase 1 until the main access complies with federal requirements. In any event, the adequacy of access to the Development will be a condition of the adoption of every Resolution of Phase Approval following Phase 1. Record at R1124

38. On November 22, 2004, the County recorded a new version of the final plat ("Recorded Final Plat"). Record at 2670-79. This new Recorded Final Plat contained changes from the Final Plat approved on October 26, 2004. Record at R2674, 2676. There is no record evidence that the Board met to discuss or otherwise address the changes from the time the final plat was approved until the time the Recorded Final Plat was filed and recorded. At oral argument, the Board and Leavell-McCombs acknowledged these changes had not been approved and agreed to act to correct this error and record the approved Final Plat.

39. Resolution #2000-13 required the Developer to comply with the terms of the Scenic Easement granted by the Developer to the United States. Resolution #2000-13 provides, "In addition to all applicable laws now in force or hereafter adopted, the Applicant and the Development shall at all times comply with. . . provisions of all easements, scenic easements, . . . and all agreements entered into between the Applicant and the United States Government." Record at R10.

40. The Scenic Easement contained the following restrictions: buildings height shall be no greater than 48 feet; no permanent hazardous products storage shall occur on the site; and no industrial activity shall be conducted on the site. Record at R433-39.

41. The Master Utility Plan submitted by the Developer to Mineral County includes a water tank that is 70' in height. Record at R2630. Wolf Creek brought this apparent violation of the height restriction to the County's attention. Record at 2490. At the oral argument, Developer affirmed that the tank would comply with the Scenic Easement because it would be partially buried and that the confusion on the plat was a misunderstanding.

42. Section 4.6.44 of Resolution #2000-13 provides, concerning utilities, that "It is assumed that electricity issues will be governed by and shall be resolved by. . . contractual [sic] arrangements with the San Luis Valley Rural Electric Cooperative, Inc. (SLVREC, Inc.) or alternative utility company." Record at R29.

43. In the Final Plan the Developer proposed that rather than purchase electricity from a local utility company, the Developer would "form one or more private and for-profit utility companies" powered by liquid natural gas. (Record at R1911-12;

R1929). Resolution #2004-21 provides that "Electricity and natural gas shall be provided by natural gas delivered to the development in liquid form (LNG). . . . The SIA for Phase 1 includes the purchase and installation of LNG storage tanks. . . ." Record at R1133-34.

44. According to Resolution #2000-13, the Village is a planned unit development and, consequently, the Planned Unit Development Act of 1972, C.R.S. §§ 24-67-101–108 applies to Board's process of approval. R. at 1.

45. Resolution #2000-13 is not a complete PUD ordinance, but it establishes the standards and procedures the Developer was required to meet prior to completing the process with Final Approval as setout in the county regulations.

46. On November 1, 2004, the Board adopted Resolution # 2004-23 approving the ADNP for Phase 1. Record at R2555-86, 714-50. However, the Board gave the Developer 30 days to correct the plat it had submitted and to file a letter of credit with the County. Record at R2585. Following approval of the Final Application and the ADNP -Phase 1, the Developer submitted and the Board approved the Final Plat on November 18, 2004. Record at R769.

47. Resolution #2000-13 § 4.6.40, Record at R27, provides:

> The Plan of Augmentation approved by the Water Court in 1990 must be amended as required by the Water Court decree or Colorado law to recognize the changes in the Development, as proposed, subsequent to the approval of such Plan. Such Amended Decree is a condition of Final Approval ….

48. The Developer did not seek an amendment of the Water Decree obtained in 1990, and the County did not amend Resolution # 2000-13 to eliminate the requirement to do so or vote to waive this requirement.

49. Resolution #2000-13 identifies the Village at Wolf Creek Water Company Articles of Incorporation, the Village at Wolf Creek Property Owners Association Articles of Incorporation, the Company Bylaws, the POA Bylaws, as required steps to accomplish prior to approval of a Final Plan.

50. The Court takes judicial notice of the contents of water cases 1987 CW 7, 1989 CW 19, and 1997 CW 8 in Water Division 3, State of Colorado.

B. CONCLUSIONS OF LAW

I. Standard of Review

Judicial Review under C.R.C.P. 106(a)(4) is limited to judicial and quasi-judicial actions by an agency or governmental entity such as a municipality, county or lower judicial body. See: *State Farm Mutual Automobile Insurance Co. v. City of Lakewood,* 788 P.2d 808 (Colo. 1990). Review of an application for a Planned Unit Development (PUD) has always been treated in like manner to a rezoning application for purposes of judicial review, *Sundance Hills Homeowners Assoc. v. Board of Comm'rs*. 188 Colo. 321, 534 P.2d 1212 (1975) and thus subject to review pursuant to C.R.C.P. 106 (a)(4). In pertinent part, Rule 106(a)(4) provides:

> Where 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:
>
> (I) review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

Under C.R.C.P. 106(a)(4), judicial review of the actions of an inferior tribunal is limited to the determination whether the tribunal exceeded its jurisdiction or abused its discretion. *Walker v. Arries*, 908 P.2d 1180, 1182 (Colo. App. 1995); *Pueblo v. Fire & Police Pension Ass'n.*, 827 P.2d 597, 600 (Colo. App. 1992). A reviewing court must uphold the decision of the governmental body "unless there is no competent evidence in the record to support it." *Sellon v. City of Manitou Springs*, 745 P.2d 229, 235 (Colo.1987); *Board of County Comm'rs v. Simmons,* 177 Colo. 347, 350, 494 P.2d 85, 87 (1972); *Marker v. Colorado Springs*, 138 Colo. 485, 488, 336 P.2d 305, 307 (1959). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross v. Fire and Police Pension Ass'n,* 713 P.2d 1304, at 1309.(Colo. 1986).

"Abuse of discretion" means that the decision under review is not reasonably supported by any competent evidence in the record. As the Colorado Supreme Court has held, "a court may reverse [the governmental body's] decision under C.R.C.P. 106 if there is no competent evidence to support its decision, that is, only if 'the ultimate decision of the [governmental] body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.'" *City of Colorado Springs v. Board of County Comm'rs of County of Eagle*, 895 P.2d 1105, 1109 (Colo. App. 1994), *cert. denied*, 516 U.S. 1008 (1995) (quoting *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986) (alterations added)), *see also*, *Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518 (Colo. 2004), modified on denial of rehearing; *Board of County Com'rs v. Conder*, 927 P.2d 1339 (Colo.1996) (citations

omitted). *De novo* review of the inferior tribunal's decision is inappropriate. *BOCC v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). A reviewing court may not relitigate or rejudge the merits of the decision by weighing evidence or making determinations of fact, as such findings are reserved for the inferior tribunal. *O'Dell*, 920 P.2d at 50; *Coleman v. Gorley*, 748 P.2d 361, 364 (Colo. App. 1987); *Corper v. City & County of Denver*, 552 P.2d 13, 15 (Colo. 1976).

Further, in determining whether the governmental body abused its discretion, a reviewing court may examine if the body either misconstrued or misapplied the applicable law. *Marshall v. City of Aspen*, 892 P.2d 394, 396 (Colo. App. 1994); *Wilkinson v. Board of County Comm'rs of Pitkin County*, 872 P.2d 1269, 1277-78 (Colo. App. 1993); *Eason v. Bd. of County Comm'rs,* 85 P.3d 600 (Colo. App. 2003). The construction of an ordinance by local officials charged with its enforcement is entitled to deference. *Bluewater Ins. Ltd. v. Balzano*, 823 P.2d 1365, 1373 (Colo. 1992)(citations omitted); *Abbott v. Board of County Comm'rs of Weld County*, 895 P.2d 1165, 1167 (Colo. App. 1995). If a reasonable basis exists for the decision maker's application of the law, the decision may not be set aside on judicial review pursuant to C.R.C.P. 106(a)(4). *Abbott*, 895 P.2d at 1167; *Platte River Envtl. Conservation Org., Inc. v. National Hog Farms, Inc.*, 804 P.2d 290, 292 (Colo. App. 1990).

Review of a judicial or quasi-judicial action by a government body or officer under the abuse of discretion standard is limited to review of the record to determine whether the governmental tribunal has abused its discretion or exceeded its jurisdiction. C.R.C.P. 106(a)(4); *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004). The party challenging the decision bears the burden of proof to show that there was no competent evidence in the record to support the decision. *City of Colorado Springs v. Board of County Comm'rs of County of Eagle*, 895 P.2d at 1109; *Coleman v. Gorley*, 748 P.2d at 364. The Court may not consider matters not contained in the record. Similarly, the Court may not consider arguments and issues not raised before the administrative agency or tribunal *Abromeit v. Denver Career Service Board,* P.3d (Colo. App. 2005).

II. History

The matter before the Court has a long and complex history as set out in the findings and below. The proposal to construct a "village" at the base of the Wolf Creek Ski Area is certainly the most significant economic development the county has seen since the heyday of mining. Like the development of the mine in Creede, the development will forever alter the landscape and bring long-term consequences to the county and its citizenry. Many small counties have struggled to control and manage development. To the credit of the present and past Boards of County Commissioners and their county attorney, the process concerning the proposal for development of a Village at Wolf Creek has been carefully evaluated in a patient and measured manner from the beginning. In fact, most of the arguments set forth in the present action stem from the meticulous detail found in the enacting Resolution #2000-13, which gave

preliminary approval of the PUD and created a roadmap for moving from conceptual approval to construction. The scrutiny this proposal receives at every step is prudent, reasonable and beneficial to the county and its citizens.

As more fully outlined in the Findings above, the Joint Venture originally obtained the Village property in 1987 pursuant to a land exchange with the United States Forest Service. In 2000, the County approved the PUD by Resolution #2000-13, the Preliminary Development Plan. The Preliminary Development Plan contemplates a series of subsequent levels of Board approval. In late 2004, the Board granted the Final Approval including approval of the Final Development Plan, the Final Plat, and the ADNP for Phase 1. The nature of the 2004 resolutions and their relationship to Resolution #2000-13 is central to determination of the issues before the Court.

III. The issues

1. Conduct of the Proceedings and Principles of Due Process

The initial request for injunctive relief and the briefs for Plaintiffs repeatedly suggest that the entire process before Mineral County was tainted by bias and denial of a fair opportunity to review the plans and plat and make full, fair comment. After review of the entire record, the Court concludes these claims are generally without merit. While the proceedings were not perfect, the public and the parties to this case were given a full and fair opportunity to comment. The opportunities to comment to the Planning Commission are described in findings above and discussed below. While the courtroom in Creede is very small, there is nothing in the record to suggest anyone who wished to comment was unable to do so. It would have been helpful to hold the hearing in the mine as the Court did, but the Court had the benefit of the county's experience to guide it in choosing a larger forum. The limitations on time to speak were reasonable given the number of people who wished to be heard. In fact, the experience of this Court is that time limits are often helpful in keeping the comments clear and to the point.

It is true that the plat was revised several times as the hearings progressed. This is discussed further below, but it is not surprising that there would be some adjustments, additions and corrections to a plat of this complexity and subject to as much scrutiny as was the case here. Review of a plat in depth is time consuming, and it would certainly have been better to have the major corrections and changes done prior to the holding of hearings.

That said, the record as a whole demonstrates that the Planning Commission and the Board fairly considered the Final Approvals. The Board's grant of Final Approval occurred after years of consideration of the Village development. The Board carefully considered the documentation submitted to support the request for Final Approval of the proposed Village development before granting the Final Approval. Two of the three commissioners on the Board that approved the Final Approval were on the Board when

it considered and approved the Preliminary Development Plan in 2000. *See* Record at R34, R1061. The Board considered the Planning Commission recommendation for approval. The Board also had the recommendations of its staff, the County Land Use Administrator and the County Attorney. The Land Use Administrator testified to the Board that the Planning Commission had "poured over these plats they asked a lot of hard and intelligent questions . . . and I believe the Planning Commission has done a very good job of reviewing this development." *Id.* The County Attorney spent 16 years reviewing the development proposals and working on the Village development approvals and conditions. *See* Record at R2409, R2460. The County Attorney testified to the Board at the October 26, 2004 that the Village development did not violate any federal or state law and was in compliance with Mineral County Subdivision, Zoning, and PUD regulations, as well as the Preliminary Development Plan approval. Record at R2460-R2461. The Board received letters from engineers and other experts, which were certified to the County upon which it could rely. *See* Record at R1308, R1610-R1622, R1627. Finally, the Board accepted and considered extensive public comment during the October 26, 2004, hearing and prior to deliberating and approving the Final Development Plan and the Final Plat.

The Board actively participated in the October 26, 2004, hearing and illustrated its knowledge of the issues involved in the approval of the Final Development Plan and Final Plat. Having approved the Preliminary Plan and thus having given tentative approval to the development, the focus in these hearings was on whether the Developer had complied with the steps that the Board had required as conditions to Final Approval, the changes in the Final Plan requested, and compliance with law and regulations.

2. Compliance with the Colorado Planned Urban Development Act of 1972

Counties are political subdivisions of the State and have only such powers as are granted to them by the Colorado Constitutions or delegated to them by the general assembly. *Beaver Meadows v. Board of County Comm's of the County of Larimer*, 700 P.2d 928, 932 (Colo. 1985). The enactment of zoning and subdivision regulations represent an exercise of the police power delegated by the State. *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Rademan v. Denver,* 186 Colo. 250, 526 P.2d 1325 (1974). With respect to a county's approval of a PUD, such as that at issue here, the Colorado PUD Act delegates such authority. C.R.S. §§ 24-67-101-108. To the extent a county approves a PUD without compliance with the procedures and requirements set forth in the statute, the approval exceeds its authority, rendering that approval invalid. *Beaver Meadows*, 700 P.2d at 935-36.

In addition to compliance with the PUD Act, a PUD, such as that at issue here, must meet all standards, procedures and conditions of a governing PUD ordinance. *See Coleman v. Gormley*, 748 P.2d 361, 363-4 (Colo. App. 1987); *Applebaugh v. Board of County Comm'rs of San Miguel County*, 837 P.2d 304, 308 (Colo. App. 1992). Further, "statutory prescriptions or exemptions dealing with conditions of subdivision approval

authority … are to be strictly construed." *Save Park County v. Board of County Comm's of the County of Park*, 990 P.2d 35, 40 (Colo. 1999).

No substantial amendment, removal or release of a provision in a final PUD plan shall occur without a public hearing and a finding that the change is "consistent with the efficient development and preservation of the entire planned unit development, does not affect in a substantially adverse manner either the enjoyment of land abutting upon or across a street from the planned unit development or the public interest, and is not granted solely to confer a special benefit upon any person." C.R.S. § 24-67-106(3)(b). The public hearing to amend an existing PUD must comply with C.R.S. § 24-67-104 (1) (e). This would require notice of the planning commission hearing at least fourteen days in advance of consideration of any amendment to the PUD. It requires written notice be delivered or mailed first class to adjoining landowners at least fifteen days prior to the hearing. § 24-67-106 only requires notice and hearing, and not consent by property owners, before a "modification" may be enacted to an existing PUD. Because "it is presumed that the General Assembly meant what it clearly said," *State v. Nieto,* 993 P.2d 493, 500 (Colo.2000), § 24-67-106 necessarily governs the procedures for amending a PUD. *Whatley v. Summit County Bd. of County Com'rs* 77 P.3d 793(Colo. App. 2003).

Mineral County Subdivision Regulations describe the limited circumstances in which a waiver of subdivision requirements may be granted: "Such variances, modifications, or waivers may be granted only by the affirmative vote of two-thirds (2/3) of the members of the Board of County Commissioners." M.C.S.R. § 6.

Plaintiff Wolf Creek argues that Resolution #2004-13 constituted the legislative enactment for the PUD, and all of its terms are legislative and thus not subject to discretionary change by the Board. Plaintiffs further contend that the approval of the Final Development Plan, Final Plat and ADNP for Phase 1 with the variances allowed should be viewed as a modification of the PUD under C.R.S. § 24-67-106, and that the County failed to comply with the statute. In reply, the Joint Venture and Mineral County contend that the adoption of the Final Development Plan constitutes the last step in the initial creation of the PUD under Mineral County Zoning Regulations and is not subject to the requirements of C.R.S. § 24-67-106.

The PUD Act defines a PUD "plan" broadly, stating "[a] plan means the provisions for development of a planned unit development." C.R.S. § 24-67-103. The PUD Act contemplates a straightforward process to ensure notice and an opportunity to be heard for the public and interested parties including, specifically, neighbors and land owners of the PUD property. The complexity of some PUDs merits a cautious and gradual process from proposal to approval. Colorado has learned by hard experience that there is often a large gap between the promises of a developer and the reality that comes into being. Consequently, Mineral County adopted a Zoning Regulation which provides for phased development and approval to protect the interests of the county and its citizenry. Mineral County Zoning Regulation § 6.14(D) specifically provides as follows:

(D) Approval of a PUD project shall be final after the Board approves a Final Development Plan, and Development Guide when required, for that PUD. If a development is a PUDM project, and the PUDM is developed in stages, approval by the Board of a Final Development Plan for the first phase shall constitute final PUD approval for the entire development. All subsequent phases shall be subject to final development plan approval as set forth in (A), (B) and (C), above.

Clearly, Resolution #2000-13 was structured to comply with this zoning regulation and to reserve control by Mineral County over the process while "preliminary" steps were taken and satisfied by the developer prior to the county giving "final" approval to the creation of the PUD. The Zoning Regulation fleshes out the bare bones provision of the statute in order to protect the interests of the county and it citizenry. The Court concludes that the structure of the Mineral County Zoning Regulations and Resolution #2000-13 show that the process to approve the PUD is not complete until the Board approves the Final Development Plan. The San Miguel County zoning regulations described in *Applebaugh v. Board of County Comm'rs of San Miguel County*, 837 P.2d 304, 308 (Colo. App. 1992), were similar in their requirements. The Court of Appeals reviewed the application of their zoning regulation and rejected the notion that rights were fully vested by virtue of an initial approval of a preliminary plan for all the reasons discussed here.

C.R.S. § 24-67-104(1) provides, "Any county with respect to territory within the unincorporated portion of the county . . . may authorize planned unit developments by enacting *a resolution* or ordinance . . ." Mineral County has wisely provided by Zoning Regulation that the creation of a PUD requires two resolutions. The Court agrees that the hearings and resolutions in October and November 2004 should be analyzed as the final step in the approval of the PUD.[1]

The Mineral County Zoning and Subdivision Regulations recognize that a significant development project such as the Village will involve a limited degree of modification over time within the general design approved at the preliminary approval stage. The Board retained discretion to address these issues as the project proceeds but also required, in accordance with the Mineral County Zoning and Subdivision

[1] The Court does note that even if viewed as a modification of an existing PUD created by Resolution #2000-13, the notices and hearing provided would comply with the provisions of C.R.S. § 24-67-106, except that Wolf Creek was entitled to the special written notice outlined above as an adjoining property owner. However, Wolf Creek appeared and participated in every hearing. It is axiomatic in such case that failure to be served or defective service is waived by their participation in the hearings. See, *Cline v. City of Boulder,* 168 Colo. 112, 450 P.2d 335, (Colo. 1969). In light of the conclusions above the Court need not address the failure to use the statutory language to support an amendment.

Regulations, for notice and hearings before the Planning Commission and the Board prior to approval of the Final Development Plan.

The Board altered and waived certain requirements contained in Resolution #2000-13 in their approvals of the Final Development Plan, Final Plat and ADNP for Phase 1. Viewed as a single process for approval, this was generally within the authority of the Board so long as it complied with the notice and hearing provisions of the Mineral County regulations and state law. The Court will discuss selected issues raised in this regard.

2. The Final Approvals Required by Resolution #2000-13 , 1.3.5

C.R.S. § 24-67-104(1) and § 30-28-116 only require one published notice of the Board's hearing on a planned unit development application before a final decision. Section 24-67-104(1)(c) requires that "at least one public hearing shall be held by the County . . . prior to approval, disapproval, or conditional approval of a planned unit development." Section 24-67-104(1)(c) also requires that "[p]ublic notice of the public hearing shall be given in the manner prescribed [by section 30-28-116.]" Section 30-28-116 requires that "at least fourteen days' notice of the time and place of such hearing shall be given by at least one publication in a newspaper of general circulation in the county." The Zoning Regulations expand the public hearing and notice provisions of C.R.S. § 24-67-104(1) and C.R.S. § 30-28-116 by requiring that two published notices occur before a Planning Commission hearing and one published notice occur before consideration by the Board. C.R.S. § 24-67-104(1) and C.R.S. § 30-28-116 only require a public hearing before the County.

Mineral County looked at the different documents which required final approval individually and determined their respective required approval processes and requirements. The Final Development Plan for the Village PUD was processed and reviewed consistent with the applicable provisions of the Mineral County Zoning Regulations and the Preliminary Development Plan. *See* Record at R8, § 2.1. The Final Plat was processed and reviewed consistent with the applicable provisions of the Mineral County Subdivision Regulations and the Preliminary Development Plan. *Id.* Lastly, the ADNP for Phase 1 was reviewed consistent with the Preliminary Development Plan. Record at R3, R8, §§ 1.3.1, 2.1. At the same time, the Board recognized the interrelationship of the three documents, and the Planning Commission received comments at the same time on all three. The Board allowed comment on the Final Plan and Final Plat at one hearing and then heard comment on the ADNP for Phase 1 at the next regular meeting of the Board, allowing a complete context for each decision they made.

a. The Final Development Plan Application and Approval

Board approval of the Final Development Plan was subject to notice and public hearing requirements under the Zoning Regulations. Section 6.14(A) of the Zoning Regulations requires that "the final development plan" conform with the "notice and

other procedural requirements of the preliminary development plan." Record at R4171. Thus, the procedural notice and public hearing requirements for a preliminary development plan are also applicable to a final development plan. The notice requirements for a preliminary development plan are found in Section 6.13 of the Zoning Regulations.

Section 6.13(I) of the Zoning Regulations requires that the Planning Commission hold a public meeting to consider the preliminary development plan application. *See id*. Section 6.13 also requires that notice of the public hearing before the Planning Commission "be published two (2) times, two weeks apart in a newspaper of general circulation in the County." *Id.* The first notice must "be published at least thirty (30) days prior to the meeting date." *Id.*

The Zoning Regulations also require that a public hearing be held before the County. Section 6.13(K) requires that "[t]he Board of County Commissioners, after receiving the written recommendation from the Planning Commission, shall hold a public hearing on the preliminary development plan." Record at R4168. Section 6.13(K)(1) further requires that "[a] notice of the date, time, and place of said hearing shall be published in a newspaper of general circulation within the County . . . at least 30 days prior to the hearing date." Record at R4168-R4169.

As described in the Findings, the Joint Venture first submitted its request for approval of the Final Development Plan on June 4, 2004. On July 15, 2004, the Planning Commission considered the Final Development Plan. Public comment was accepted and made at July 15, 2004 meeting. Members of the public were given a substantial amount of time to comment. Wolf Creek's and Colorado Wild's representatives were present and gave comments. The Planning Commission recommended approval by the Board. However, the notice for that public meeting of the Planning Commission was not sufficient for approval of the Final Development Plan, and the Planning Commission determined it should set a further hearing and reconsider the matter. *See* Record at 1940.

The Planning Commission noticed and again considered the Final Development Plan during a public hearing on September 16, 2004. Notice of that public hearing was published in the Mineral County Miner on August 12, 2004, August 19, 2004, and August 26, 2004. Public comment was accepted and made at the September 16, 2004 public hearing. Members of the public were given a substantial amount of time to comment. The members of the public that commented at the September 16, 2004 meeting included Wolf Creek's and Colorado Wild's representatives. The Planning Commission continued the September 16, 2004 hearing on whether to recommend approval of the Final Development Plan to the Board, because there were ongoing changes in the proposed plat and the Planning Commission members wanted to see the revisions in the Final Plat before deciding whether to recommend approval of the Final Development Plan.

The continued public hearing to consider the Final Development Plan by the Planning Commission took place on October 21, 2004. Notice of the continued public hearing was published in the Mineral County Miner on September 30, 2004 and October 14, 2004. Public comment was again accepted and made at the October 21, 2004 public hearing. The only members of the public that commented at the October 21, 2004 meeting were Wolf Creek's and Colorado Wild's representatives. The Planning Commission recommended in writing the approval of the Final Development Plan by the Board. *See* Record at R2189-R2201, R4302-R4307.

On October 26, 2004, the Board considered the Final Development Plan at a public hearing. Notice of that public hearing was published in the Mineral County Miner on September 23, 2004 and October 7, 2004. Public comment was accepted and made at the October 26, 2004 public hearing. Members of the public were given a substantial amount of time to comment. The members of the public that commented at the September 16, 2004 meeting included Wolf Creek's and Colorado Wild's representatives. In addition, the Board accepted and considered extensive written public comments. The Board approved the Final Development Plan at the October 26, 2004, public hearing. Resolution #2004-21. *See* Record at R2546-2555, R1026-R1065. Mineral County complied with its own zoning and subdivision regulations and Colorado law in the procedural conduct and approval of this resolution.

b. The Final Plat Process

Only one Mineral County regulation addresses the filing of a final plat. *See* Record at R4041, § 2.3.3.1. Section 2.3.3.1 of the Mineral County Subdivision Regulations (the "Subdivision Regulations") provides:

> Not more than twelve (12) months, or any extension thereof, after approval of the Preliminary Plat, and at least fifteen (15) days prior to a regular County Planning Commission Meeting, the original tracing and five (5) prints of the final plat together with the required supplemental material shall be submitted by the subdivider to the County Clerk.

Record at R4041. A Final Plat was submitted on June 4, 2004. *See* Record at R4300. An amended Final Plat in mylar format was submitted on October 5, 2004. *See* Record at R4300-4301, R2174. The amended Final Plat included minor changes from the previously submitted Final Plat and included the original tracing. *See* Record at R2175.

The Planning Commission first considered the Final Plat during a public hearing on September 16, 2004. Notice of that public hearing was published in the Mineral County Miner on August 12, 2004, August 19, 2004, and August 26, 2004. Public comment was accepted and made at the September 16, 2004 public hearing. The members of the public that commented at the September 16, 2004, meeting included Wolf Creek's and Colorado Wild's representatives. The Planning Commission deferred its decision on whether to recommend approval of the Final Plat to the Board at the

September 16, 2004 public hearing, because the Planning Commission wanted to see a revised version before deciding whether to recommend approval.

The amended Final Plat submitted on October 5, 2004, was considered by the Planning Commission at a public hearing on October 21, 2004. Notice of that public hearing was published in the Mineral County Miner on September 30, 2004 and October 14, 2004. Public comment was again accepted and made at the October 21, 2004, public hearing. The only members of the public that commented at the October 21, 2004 meeting were Wolf Creek's and Colorado Wild's representatives. The Planning Commission also accepted and considered extensive written public comments. The Planning Commission recommended approval of the Final Plat by the Board.

On October 26, 2004, the Board considered the Final Plat at a public hearing. Notice of that public hearing was published in the Mineral County Miner on September 23, 2004 and October 7, 2004. Further minor amendments to the plat were presented at the hearing. Public comment was accepted and made at the October 26, 2004, public hearing. Members of the public were given a substantial amount of time to comment. The members of the public that commented at the October 26, 2004, meeting included Wolf Creek's and Colorado Wild's representatives. In addition, the Board accepted and considered extensive written public comments. The Board approved the Final Plat at the October 26, 2004 public hearing. *See* Record at R2546-2555, R1026-R1065.

The Final Plat was a work in progress. It changed from hearing to hearing and was even modified after it was approved by the Board in ways not discussed or approved at the hearing. The defendants acknowledge these last changes are invalid.

Wolf Creek had a particularly great interest in the fine details of the plat and did submit written comments which were taken into account and resulted in modifications to the plat. The Court well understands that minor changes in plats are commonplace and to be expected. As illustrated by the slides shown at the oral argument, the changes were not global in scope, but they were also much more than simply correcting a measurement or properly labeling an easement or distance. The Court asked counsel what the hurry was to approve a plat that was not completed and had not been thoroughly reviewed. In truth, the Developer was not ready for the hearing. It could have been continued to allow further consultation with Wolf Creek and the Mineral County planning staff to be sure that the plat proposed was in fact what the Developer wanted to have considered, and that it was in all respects accurate and complete and consistent with the Final Development Plan which was separately submitted. The County and Joint Venture have conceded the recorded plat does not reflect the plat as approved and have agreed to rerecord the Final Plat as approved. In light of the ultimate disallowance of the Final Plat in this opinion, that issue is moot. The Court notes the process for approval provided by Mineral County allowed more public comment and opportunity to be heard than required by law. Had the proposed plat been more thoroughly reviewed in advance much of the confusion and tension, especially with Wolf Creek could have been avoided. Presumably that will be so when the a plat is

again proposed. Mineral County complied with its own zoning and subdivision regulations and Colorado law in the procedural conduct and approval of this resolution.

c. The ADNP for Phase 1

Under the Preliminary Development Plan, the ADNP for Phase 1 must first be reviewed by the County Land Use Administrator. Record at R3, § 1.3.1. The ADNP for Phase 1 is then considered by the Planning Commission at a regular meeting. *Id.* The Planning Commission decides whether to recommend to the Board that it approve the ADNP for Phase 1. *Id.* The Board must then consider, and decide whether to approve, the ADNP for Phase 1 at its next *regular* meeting. *Id.* There are no notice or public hearing requirements with respect to the consideration or approval of an ADNP in either the Preliminary Development Plan or the County's regulations.

The Joint Venture first submitted the ADNP for Phase 1 on June 4, 2004. On July 15, 2004, the Planning Commission considered the ADNP for Phase 1. Public comment was accepted and made at the July 15, 2004 meeting. Members of the public were given a substantial amount of time to comment. The only members of the public that commented at the July 15, 2004, meeting were Wolf Creek's and Colorado Wild's representatives. The Planning Commission recommended approval by the Board along with the other documents. However, the notice for that public meeting of the Planning Commission was not sufficient for approval of the Final Development Plan, which was also being reviewed and which was to be approved along with the ADNP for Phase 1 under requirements of the Preliminary Development Plan. *See* Record at 1940.

The Planning Commission again considered the ADNP for Phase 1 (even though notice and public hearing did not have to be provided under the Preliminary Development Plan or the Mineral County regulations for approval of an ADNP unless it constitutes an amendment of the PUD) during a public hearing on September 16, 2004. Notice of that public hearing was published in the Mineral County Miner on August 12, 2004, August 19, 2004, and August 26, 2004. Public comment was accepted and made at the September 16, 2004 public hearing. Members of the public were given a substantial amount of time to comment. The members of the public that commented at the September 16, 2004 meeting included Wolf Creek's and Colorado Wild's representatives. The Planning Commission continued its decision on whether to again recommend approval of the ADNP for Phase 1 to the Board at the September 16, 2004 public hearing.

The ADNP for Phase 1 was again considered by the Planning Commission at a public hearing on October 21, 2004. Public comment was again accepted and made at the October 21, 2004 public hearing. Wolf Creek's and Colorado Wild's representatives commented at the October 21, 2004. The Planning Commission also accepted and considered extensive written public comments. The Planning Commission

recommended approval of the ADNP for Phase 1 by the Board. *See* Record at R2189-R2201.

The Board informed all persons in attendance at the October 26, 2004 public hearing for the Final Development Plan, including Wolf Creek, that it would consider the ADNP for Phase 1 at its November 1, 2004, regular meeting. On November 1, 2004, the Board considered the Joint Venture's ADNP for Phase 1 at its regular meeting on November 1, 2004. Notice and public hearing was not required for the November 1, 2004 meeting under the Preliminary Development Plan or the Mineral County regulations, but an agenda was posted showing that the ADNP for Phase 1 would be considered. Although it was not required, public comment was again accepted and made at the November 1, 2004, Board meeting. The members of the public that commented included Wolf Creek's and Colorado Wild's representatives. The Board approved the ADNP for Phase 1 at the November 1, 2004, meeting by Resolution # 2004-23.

In summary, the notices and the proceedings leading to the approval of the Final Development Plan, Final Plat and ADNP for Phase 1, were procedurally compliant with the zoning and subdivision regulations of Mineral County and state law. This leads us to the objections to basis in the record for particular findings of the Board.

4. Approval of the POA and Water Company Formation

The Plaintiffs complain that there was inadequate public notice and comment prior to approval of the Articles of Incorporation and Bylaws of the POA and Water Company. The only requirements with respect to the contents of the notice are that it identify the "time and place of the hearing." C.R.S. § 30-28-116. All of the notices for the Planning Commission and the Board public hearings accurately specified the time and place of the public hearings. At the October 4, 2004 hearing, the Board approved the POA Articles of Incorporation and Bylaws, and the Mutual Water Company Articles of Incorporation and Bylaws. *See* Record at R2413-2430, R1573. There is nothing in any regulation or statute that requires public hearing and published notice with respect to such issues. The approvals of such articles and bylaws were based on their compliance with applicable statutes and the terms of the Preliminary Development Plan. Under the Preliminary Development Plan, the POA and the water company had to be approved prior to Final Approval. *See* Record at R1031-R1033, §§ 1.3.4, 1.3.7. There was no requirement of a public hearing or a published notice prior to the County's approval of the POA and the water company. Experience teaches that as a POA takes over responsibility for many of the obligations of the developer, conflicts and problems often arise. Similarly, water is never without conflict. The Court understands that public concern to assure a thorough and complete review of the structure of these companies is in the public interest. While broader input might have served a good purpose, it was not required by law or by Resolution #2000-13. The formation of these entities was a prerequisite to submission of a Final Development Plan but they were not part of the Final Development Plan. The process and actions of Mineral County were reasonable and lawful. There was no abuse of discretion in their actions in this regard.

5. Letter of Credit

The Board reserved discretion to modify the provisions of the enabling Resolution #2000-13 (R1-37) in at least three separate provisions. At R16, Section 4.3.2, the Board reserved the following authority:

> The Board may specify, in its reasonable discretion, additional matters that must appear in the documents described in paragraph 4.2. The board may also specify those matters that may be amended and those that may not. All required documents must be in formal, approved form or fully implemented prior to Final Approval.

At the time the Board adopted the Final Approval, it understood that its approval would likely be appealed and that other litigation was ongoing and additional litigation was a possibility. Consequently, it modified the timing of submission but not the total amount of security required for Phase 1. The Board's action in this regard is obviously fair to the Developer given the circumstances and is the kind of clear discretion that the Resolution contemplated. The Letter of Credit approved by the Board in the Subdivision Improvements Agreement for Phase 1 is consistent with Section 4.6.32 of the Preliminary Development Plan.

The Board reserved discretion to act sensibly under possibly changing circumstances by including provision 4.6.32, R25, in Resolution #2000-13, which allows the Board to accept ". . . other security deemed acceptable by the Board in its sole and absolute discretion." Section 1.3.1, R3, also provides that "...the form and adequacy of the security for such [Subdivision Improvements] Agreement ...shall be approved at the sole discretion of the Board. These actions cannot be construed as an abuse of discretion.

6. Wetlands and the Clean Water Act

Resolution #2000-13 §§ 2.7.2 provides that "documentation to be submitted shall comply with all applicable laws and the Preliminary Plat and Preliminary Development Plan as approved herein. Section 4.6.54 of the Preliminary Development Plan provides the Developer must provide:

> All other approvals and permits as required by applicable law include the Colorado Department of Health and Public Utilities Commission and all other state and federal agencies having any jurisdiction with respect to the Development- To the extent deemed necessary by the Board, such approvals and permits shall be obtained prior to Final Approval. To the extent not necessary at that time, all approvals and permits required for a DNP will be required in the approval

of the ADNP and obtained prior to the adoption of a Supplemental Resolution for that DNP.

The Board reasonably reserved its discretion with regard to issues of this nature. The record here specifically shows that the Board did not require the Developer to obtain a 404 permit under the Clean Water Act because it concluded based upon the record before it that such a permit was not necessary. The record sufficiently supports this conclusion. Record at R1592-1601; R 2433-2434; R 2448-2449. However, the Board did not release the Developer from its continuing obligation to comply with federal law and regulations throughout the development of the project and thus reserves it right to act in the future to protect the wetlands as evidenced by the restrictions contained in the Final Development Plan and Final Plat which continue to require compliance with federal law. The Board's actions are supported in the record, comport with the Preliminary Development Plan and are not an abuse of discretion.

7. Snow Removal

Section 4.6.39 of the Final Development Plan addresses the removal of snow. The Board received in evidence a plan for snow removal and various documents regarding this issue. Record at R158-583; R1626-1627. Given the limited construction involved in Phase 1 and the record before the Board, there was competent evidence addressing snow removal for Phase 1. Moreover, it is only when the Supplemental Resolution is proposed that the Developer is required to be assured. Resolution #2000-13, §4.6.39. Section 4.6.39 of the Preliminary Development Plan provides:

> Snow removal and snow storage – These services shall be provided by the POA and shall be included in the Final Plan, the Master Covenants and the Articles of Incorporation of the POA. See 4.6.25 for dedication of land to the POA for storage of snow removal equipment and vehicles. A building (or part of a building) for storage of adequate snow removal equipment shall be included in the Subdivision Improvements Agreement for Phase 1, constructed at the Applicant's expense and conveyed to the POA without charge *prior to the adoption of a Supplemental Resolution for Phase 1*. The costs for subsequent expansion of buildings and the purchase of necessary equipment shall be included in each subsequent Subdivision Improvements Agreement. Additional buildings (or building space) and necessary equipment shall be paid for by the Applicant and conveyed to the POA without charge. The POA shall be responsible for the operation, maintenance, repair and replacement of all equipment and the building(s). In addition, *a Supplemental Resolution covering Phase 1 shall not be adopted until snow storage is assured*. At such time as off-site snow storage is necessary, Applicant shall also present a signed Agreement, either with the Wolf Creek Ski Area or in Permit or License form with the USFS, permitting the deposit of snow on the property of either or both, as the case may be. Such signed Agreement, Permit or

> License shall be a condition of the adoption of any Supplemental Resolution applied for after the necessity for off-site snow storage is identified.

Record at R27. This section requires that snow storage must be assured before a Supplemental Resolution is approved by the Board. A Supplemental Resolution has not yet been approved by the Board. In addition, Section 4.6.39 requires that provisions relating to snow removal and storage be included in the Final Development Plan and related documents. They were. Section 4.6.39 of the Final Development Plan addresses snow removal and storage. The Joint Venture submitted a plan for snow removal and storage. *See* Record at R158-R161, R583. The Joint Venture also submitted letters from experts showing the adequacy of snow removal and storage. *See* Record at R1626-R1627. During the October 26, 2004 Board public hearing, the Joint Venture's representative testified that there was adequate snow storage. *See* Record at R2447. As noted by the County Attorney in the September 16, 2004, Planning Commission hearing, snow removal will not be an issue until later phases of the development. *See* Record at R2257-R2259. Phase 1 consists of 70 acres, thus, leaving approximately 215 acres on which to store snow. *See id*. In addition, the Plat Notes provide for snow storage easements. Record at 2761, ¶ 5. In short, there was competent evidence before the Board demonstrating that there was an adequate plan for snow removal and storage. The Board did not abuse its discretion in finding these provisions adequate for Phase 1.

8. The Amended Scenic Easement

The Plaintiffs argue that the Board's approval of the Final Plat was arbitrary and capricious because the Joint Venture did not comply with the requirements of the Amended Scenic Easement. The Amended Scenic Easement runs in favor of the Forest Service *See* Record at R433. By its terms, no one else is entitled to directly enforce the terms of the Amended Scenic Easement. *See* R433-R440. In addition, the Amended Scenic Easement provides a detailed and elaborate procedure for (1) Forest Service review and determination of whether the Village plans are consistent with the Amended Scenic Easement, (2) resolution of any disputes between the Joint Venture and the Forest Service, if the Forest Service determines that the Village plans are not consistent with the Amended Scenic Easement, and (3) the ability by the Forest Service to waive the requirements of the Amended Scenic Easement. Record at R436-R437, § 3.

There is nothing in the record suggesting the Forest Service has found noncompliance with the Amended Scenic Easement. In fact, the record contains at least a preliminary approval of the Village development by the Forest Service. *See* Record at R540-R561. Even if the Forest Service ultimately determines that the plans do not satisfy the Amended Scenic Easement, there is a specific procedure for resolution of disputes between the Joint Venture and the Forest Service concerning compliance. Record at R436. In addition, the Amended Scenic Easement gives the Forest Service the power to waive any of the requirements:

> c. The Forest Supervisor, Rio Grande National Forest, may, at his discretion, waive in writing any provision of this easement. The Forest Supervisor, Rio Grande National Forest, may terminate any provision or all provisions of this easement when such termination is determined to be in the public interest. Such waiver or termination shall not be subject to any provision of law regarding abandonment of property of the United States.

Record at R437.

Mineral County has the right to review generally and require specifically the compliance of the Joint Venture in this regard. Two possible areas of non-compliance were brought to the Court's attention. Both are discussed below. However, the review, arbitration, and waiver provisions of the Amended Scenic Easement place the final review of compliance with the Forest Service who is the beneficiary of the easement. It will make its own, enforceable determination of whether the Village plans will ultimately comply with the Amended Scenic Easement. That decision will be made by the Forest Service at some point in the future. That fact does not alter the fact that the Board's Final Approval appropriately required compliance with the Amended Scenic Easement. Record at R1036, R1047 at § 2.3 and, §2.5(d), § 4.6.19. The plat notes to the Final Plat also require compliance with the Amended Scenic Easement. R.2671, Plat Note #4. Thus, the Board's Final Approval adequately addresses compliance with the Amended Scenic Easement.

The Plaintiffs complain that a water tower appears to be taller than permitted. This issue was not really addressed in the record below and Developer and Mineral County have affirmed that the tower will not exceed the height restrictions of the Scenic Easement and the plat so requires. Mineral County does not claim any authority to allow a violation of the Scenic Easement and the Court concludes there is none with regard to the tower given the record as it now stands.

9. The Electric Power Generation

The Amended Scenic Easement prohibits "permanent hazardous products storage." Record at R435. This restriction applies to hazardous waste storage. The Joint Venture wants to use Liquid Natural Gas to run the electric generator plant. *See* Record at R1929. The Amended Scenic Easement also prohibits "No mining or industrial activity shall be conducted by the Grantors." Record at R436. This issue was first raised in the District Court, and thus cannot be considered by the Court. The Court can only consider arguments that were properly presented for determination by the Board. *Abromeit v. Denver Career Service Board*, __ P.3d __ (Colo. App. 2005)(2005 WL 1903840 at *7). The Record contains no discussion or evidence concerning the contention that the power plant violates the Amended Scenic Easement. There is nothing from the Forest Service to support the objection now raised by Plaintiffs.

The Amended Scenic Easement provides "Development of real property which is the subject of this easement shall include a mix of residential, commercial, and recreational units typical to an all-season resort." This agreement was entered into by Forest Service and the Joint Venture with a clear understanding that the Joint Venture (which then included Wolf Creek) intended to build a large scale resort in conjunction with the ski area. In other words, the need for significant infrastructure for utilities including electricity, water and waste water treatment was evident to all the parties at the time the agreement was entered into.

Under the Final Approval, electricity and natural gas will be operated by a mutual utility company or similar entity to supply the needs of each phase of the development. *See* Record at R1055-1056 (Resolution 04-21, § 4.6.44). In the Preliminary Plan power was expected to come from one of the rural electric providers. Both onsite generation of electricity and connecting to an existing service provider involve inherently dangerous facilities. Either way, these facilities are ancillary to the residential and commercial activity at the Village. Absent indication from the Forest Service that it believes any of these are in fact violations of the Scenic Easement, it is reasonable for the Board to view the power generation in the same manner it views a water or wastewater treatment plant. In other words, it would be illogical to read this prohibition to preclude the provision of utility services necessary to run the all-season resort contemplated by the Amended Scenic Easement. In any event, as discussed above, whether these uses violate the Amended Scenic Easement will be determined by the Forest Service, not the Board. The Board did not abuse its discretion by simply requiring future compliance with the Amended Scenic Easement.

10. Creede Consolidated School District

The Record contains competent evidence that the Joint Venture adequately addressed future school sites or dedications.

11. The Water Decree

Resolution #2000-13 § 4.6.40, Record at 27 (B), provides:

> The Plan of Augmentation approved by the Water Court in 1990 must be amended as required by the Water Court decree or Colorado law to recognize the changes in the Development, as proposed, subsequent to the approval of such Plan. Such Amended Decree is a condition of Final Approval . . .

The Developer did not seek an amendment of the Water Decree obtained in 1990, but did submit documents from their water attorney and their water engineer indicating that the existing water decree need not be amended because the available water is adequate. As pointed out by the Joint Venture and Board elsewhere, the proposed Village contains essentially the same number of rooms and population as was proposed and approved in Resolution #2000-13.

Addressing the needs for potable water and wastewater treatment and the maintenance of stream flows are important concerns of the public, and this was expressed in the comments to the Planning Commission and the Board in the public hearings. These issues have also received great attention over the last fifteen years from Mineral County planners and the Board.

The record contains adequate evidence showing that the Board properly approved the Final Development Plan without requiring the Joint Venture to amend the existing water decree. The Court has reviewed the water decrees in 1987CW 7, 1989CW19, and 1997CW8 in Water Division 3, State of Colorado, to be certain of the context of the discussion of this issue in the record. The language contained in Resolution #2000-13 with regard to this issue states: "The Plan of Augmentation approved by the Water Court in 1990 must be amended as required by the Water Court decree or Colorado law to recognize changes in the Development, as proposed, subsequent to the approval of such plan." The Water Court has not required a change to the Plan of Augmentation.

The Court cannot independently reweigh the evidence with regard to the adequacy of the evidence on these matters. The Court notes that questions regarding the Developer's engineers' calculations were raised by Wolf Creek's engineers. Wolf Creek was an applicant in water case 1987CW7 and has a water right adjudicated there as well. In any event, the record contains affirmations from the water attorneys for Developer and their water engineer that the calculations for water under the Final Plan conform with the limits of the decrees and do not involve any increase in EQR's. See Record at R276. The County Attorney reviewed these matters and opined that there was no need to amend the water decree. Record at R 2259-2261.

The Developer supplemented the record with the October 6, 2004 letter from water counsel for the Developer to the Division Engineer for Water Division 3 reaffirming that there is no increase in EQR's. Counsel specifically invited the Division Engineer to write if the State did not agree that amendment of the decree in 1987CW7 was unnecessary. The State Engineer has statutory responsibility to oversee the beneficial use of water in Colorado and does so aggressively. The record shows nothing from the State or Division Engineer supporting the suggestion the decree required amendment. The letter from the Developer's water attorney to the Division Engineer states:

> As a follow up to our conversation, I am writing to confirm that the State Engineer has determined that the decree entered in Case No. 87CW7, Water Division 3 does not have to be amended to (1) address a change in the mix of units to be the subject of the plan of augmentation so long as there is not an increase in the 1748 EQRs that are specifically set forth in the decree or (2) address a change in the storage facilities for the project from ponds to sealed storage tanks, provided that sufficient storage be constructed to implement the terms and conditions of the decree.

…. If this letter does not properly reflect the State Engineer's decision, please let me know in writing…

Counsel also wrote the county attorney a detailed response to the issues raised by water counsel for Wolf Creek and their engineer on October 19, 2004. This correspondence was shared with the State Engineer and the Division Engineer and includes the September 29, 2004, letter from Joe Tom Wood, P.E. of Martin and Wood, the water engineers for Developer. Mr. Wood's letter states:

> The decree entered in Case No 87CW7 approved all of the Village's water rights which are needed for the build-out of the Village. Operation of the plan for augmentation, which involves use of water from storage, will be in accordance with the decree's terms and conditions.

While Plaintiffs correctly suggest the Board could have hired an independent engineer to review this matter, they were not obligated to do so, and the record clearly provides a rational basis for the Board's determination that amendment of the decree is unnecessary and futile. The Board did not abuse its discretion in concluding that it was unnecessary for the Joint Venture to seek amendment of the water decree.

12. Lack of Adequate Access to the Highway

The limited access allowed by FSR 391 does not constitute "access" for the Village at Wolf Creek sufficient to comply with C.R.S. § 30-28-133.1 (2004) or MCSR 2.4.1.4. The finding to the contrary by the Board is not supported by the record and is an abuse of discretion. The Court has asked itself throughout this case whether one can have a "Final Plat" if one does not know where access to the highway will come from. C.R.S. §30-28-133.1 requires access to the state highway system as a prerequisite to submitting a subdivision application:

> No person may submit an application for subdivision approval to a local authority until ***the subdivision plan or plat provides*** . . . that all lots and parcels created by the subdivision ***will have access to the state highway system in conformance with the state highway code.***

C.R.S. § 30-28-133.1 (2004) (emphasis added).

Section 4.6.11 of Resolution #2000-13, consistent with the statutory mandate above, makes assured access between the state highway system and the Development an express condition of Final Approval. Record at R20. This requirement is consistent with Section 2.4.1.4 of the Mineral County Subdivision Regulations ("MCSR"), which provides: "At a minimum, the Application [for approval of the Final Plat] shall include ***clear evidence of legal access from the tracts to be created to the public highway system*** *. . . .*" (emphasis added).

Contrary to the contention of the Plaintiffs, Resolution #2000-13 does not require that the road exist as a prerequisite of Final Approval. In the end, the Court is asked to determine what the legislature requires when it used the word "access." "Access" is a word used often in jurisprudence. "Access to justice" and "access" to the courts are subjects of much discussion. In the same way, the word "access" in C.R.S. § 30-28-133.1 (2004), must be read to mean meaningful and adequate access in relation to the property in question and the purpose for which the zoning change is being requested. The Court would expect the record to reflect discussion of concerns about public safety entering and exiting the PUD and entering the state highway as well as contingencies such as fires, snow slides and land slides. As the Supreme Court said in *Beaver Meadows v. Board of County Com'rs,* 709 P.2d 928 (Colo. 1985),

> We believe, however, that it would defy reason to conclude that the legislature intended that a PUD application should be reviewed without taking into account the adequacy of access roads to assure the health and safety of persons traveling to and from the development and the conformity of such roads with the comprehensive plans.
>
> To hold that the county should engage in PUD review oblivious to these critical public concerns would be to ignore the pervasively expressed legislative intent that counties plan, zone, and regulate to provide a safe and efficient network of roadways, as reflected in the planning, zoning subdivision and PUD statutes.

Until the hearings on the Final Plan, Mineral County had insisted that Joint Venture provide evidence of both an easement approved for year-round use by the Forest Service and that CDOT approved the easement. The Developer requested extensions to obtain a meaningful access easement(s). But in the fall of 2004, the Developer argued and the Board agreed that there has always been access to this PUD via FRS 391. This conclusion is completely lacking in support in the record, and is contrary to the requirement of the statute and public policy previously cited. This sudden change in position is surprising. In fact, the Joint Venture had conceded what it needed to do to obtain access satisfactory to the statute in its requests for extensions of time in the past. Bob Honts, on behalf of the Joint Venture, wrote to the Board June 1, 2001, and July 7, 2002, requesting extensions of time. Record at R. 3218, R3065. The first letter acknowledges that the Joint Venture must obtain "approval by the United States Forest Service of Permanent Access Road Easement to provide year round ingress and egress and utility easements to serve the Village at Wolf Creek." It goes on to state the Joint Venture is seeking to "obtain permanent access road easement from SH 160 to Village at Wolf Creek and any required CDOT highway access permits." The second letter requesting a further extension describes these as "necessary road and utility easements." The Preliminary Plat did not even depict FSR 391. Exhibit 22.

The content of the record cited to justify the change in position by the Board consists of evidence that a title insurance company is willing to write title insurance

guaranteeing access, a conclusion that the "quality of access is a marketing issue" (Record at R1928), and the fact that the National Forest Service has assured the Developer and Mineral County that if FSR 391 "access" is terminated, federal law will require providing reasonable access to the Village property under 16 U.S.C. § 3210(a). *See* Record at R259. The Forest Service did promise reasonable alternative access to the property if the Joint Venture's authority to use FSR 391 were to be terminated by citing the statute guaranteeing in holding land owners access.

> The Alaska National Interest Lands Conservation Act (16 U.S.C. § 32.10(a) ("ANILCA") assures reasonable access to in holdings subject to Forest Service regulations. Accordingly, reasonable access will be provided. Forest Service regulations. Accordingly, reasonable access will be provided to Leavell-McCombs upon termination of authorization to use FSR 391 consistent with applicable regulations. Nothing in this letter is intended to prevent the Forest Service from temporarily or permanently closing FSR 391 for public health and safety or other conditions.

Id.

The fact that alternate access will be provided at some time in the future is not sufficient for the Board to act to approve the Final Development Plan, Final Plat and ADNP for Phase 1. The promise for some future access does not tell us where that access will come from or touch the property. The route from the state highway to the Village at Wolf Creek property has to affect the design of the Village and the plat. A copy of Exhibit 2, Figure 3, is attached to this order as Attachment A.

There is also discussion in the record that this is a federal issue and therefore the concerns evident in Resolution #2000-13 which led to the language regarding access in that resolution are unnecessary. Section 4.6.11 of the Final Development Plan approval provides:

> State Highway access and Forest Service access road to the Development – In as much as the Development does not access a County road, the County has no authority to regulate this subject. . . . Access across Forest Service Lands, between the state highway and the Development is currently over U.S.F.S. Road 391 and is controlled by compliance with federal laws, rules, and regulations. If approved by the U.S.F.S., an alternate access road or roads shall be constructed by the Developer in accordance with federal requirements. . . . Until an alternate access road is permitted by the U.S.F.S., the Developer shall be required to mitigate the impacts arising from the legal and practical limitations of U.S.F.S. Road 391, including purchase and conveyance to the POA without charge of vehicles capable of providing solid waste disposal, emergency medical services, law enforcement services and LNG services, with or without snow removal. No Supplemental Resolution shall be adopted for Phase 1 until the main access complies with federal requirements. In any event, the adequacy of access to the Development

will be a condition of adoption of every Resolution of Phase Approval following Phase 1.
Record at R1046.

The reference to the "legal and practical limitations of FSR 391" obviously understates the problem. Construction of a development of this size without a good all-weather road is problematic at best. The PUD is a small city designed to serve year-round recreational uses and skiing in particular. Approval of FSR 391 as reasonable access might be acceptable for a small lodge with winter access only by skis and snowshoes and with supplies brought in by snowshoe, snowcat and snowmobile. Access to the Village depicted in the Exhibit 2 and in the Final Plat requires year-round access for significant vehicle traffic. Mineral County acknowledges this at times and argues that access is going to be provided sooner or later under the federal act for which the Environmental Impact Statement is already underway. As noted elsewhere, the plan for this property was understood by the Forest Service at the time they made the land swap. The fact that a real access is likely to be acquired is certainly true but begs the question as to existence of access at this time as required by law.

At the time Resolution #2000-13 was enacted, the Developer-which then included Wolf Creek- fully anticipated that a new road would be built from the ski area entrance along the east side of the new parking lot which would take traffic within a short distance of the development. This proposal appeared eminently reasonable, environmentally advantageous and consistent with the usual concerns one would expect from CDOT and from the National Forest. The Board had before it, as does this Court, the Easement Grant and Agreement (Village Access Road Easement) dated July 13, 1999, and apparently executed by Kingsbury Pitcher on behalf of Wolf Creek. (Record at 76-88). The Board also had before it the Agreement for Ski, Utilities, Road and Parking Easements for the Village at Wolf Creek, dated July 16, 1999, and also signed by both the Joint Venture and Wolf Creek. (Record at R89-106). Wolf Creek has had a change in leadership and now opposes the development.

This significant change in the relationship between Wolf Creek and the Joint Venture has created real uncertainty with regard to the access issue. While it is likely that the Forest Service and CDOT will eventually approve an access or multiple accesses that can reasonably serve the Village, it is not a certainty and the DEIS makes clear that there are several alternatives under study. [2] The configuration of the PUD as depicted in Exhibit 2 illustrated the problem. It clearly anticipates the main entrance to be through or parallel with the lower Ski Area parking lot. If the Forest Service chooses another route, the current plat is not workable. You do not build a house without knowing where the doors are.

It is understandable that the Board is frustrated by these events. Some of the citizen concerns raised in the public hearing related to the need for protection in the

[2] It would surprise the Court if multiple accesses are not chosen for a fully built-out Village for public safety reasons. Similarly, a road access configuration at Highway 160 which is satisfactory for Phase 1 may not be considered satisfactory for a built-out Village at Wolf Creek.

event the development stalls or fails. Others asked how long it will be before construction and the anticipated new jobs will become a reality. These are important concerns that the Board clearly shares. Lengthy litigation delays do not encourage developers or county government anxious to see the benefits they believe will come with successful development. Faced with these delays, Mineral County approved the Final Plat without the Joint Venture obtaining Forest Service or CDOT approval for such access. [3]

The suggestion that the only existing access from the highway to the Village property, FSR 391, is suddenly adequate access is unsupported by the record. FSR 391 is a single lane, gravel road. Record at R258, 1405. It is designed for use only by passenger cars traveling at low speeds. Record at R1405 n.9. In addition, due to seasonal snow accumulation, vehicular access to FSR 391 is allowed only from mid-June to September. *See* Record at R258, R1450, R1451.

At the hearings on October 5, 2004, the Joint Venture argued to the County that access to the Development is actually provided by FSR 391. Record at 2625. This is contrary to prior representations by developer. FSR 391 was previously conceded by all to be completely inadequate and it remains a single–lane, gravel road available to the public only for limited seasonal use. Record at R258.

As set forth in the Record, the Forest Service recently cautioned that,

> The . . . DEIS and letters do not constitute a decision, an action, or purport to convey or grant any right of access on FSR 391 to any party. At most, these documents recognize a preexisting limited right of access available generally to the public. Any contrary or expanded position taken by the . . . Joint Venture . . . . as to the status of FSR 391 . . . is their own, and not that of . . . the USDA-Forest Service." Record at R1451; *see also* Record at R1486; Record at R258.

The Forest Service has never authorized reconstruction or augmentation of FSR 391 and it has cautioned that any use by the Joint Venture that exceeds current use restrictions would require a special permit and trigger the requirements of NEPA. Record at R1450.

CDOT also wrote Mineral County Land Use Administrator, Les Cahill. CDOT wrote, "This [Development] will require an Access Permit and a detailed Traffic Impact Analysis. Until an exact arterial system is identified and any access issues resolved, we

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[3] The Joint Venture has now applied to the Forest Service for an access road, but this was not noticed in the Federal Register until February 2004 (years after Resolution #00-13). As noted above, this approval has not been obtained. Record at R1410. The Forest Service has published a draft environmental impact statement and is now in the process of receiving comments from the public. *See* Dear Reviewer Letter from United States Department of Agriculture of 9/30/04, attached to Wolf Creek Ski Area Motion for Stay as Ex. 11. The deadline for comments was extended.

do not recommend final approval of the proposal. To date, we have seen no detailed plan or had any further information submitted for review." Record at R3047.

Despite the severe limitations of FSR 391 and the admonitions of the Forest Service and CDOT, Mineral County Land Use Administrator, Less Cahill, opined to the Board in July 2004 that access to the development was assured and, in any event, "of little concern to the County":

> [T]he [Development] has practical access as well as legal access over Forest Service Road #391. The [Joint Venture] has taken care of issues over the snow access by providing for over the snow vehicles for ambulance service into the development. The quality of the access is a marketing issue and therefore of little concern to the County. Since the Forest Service has given a letter stating the present access is by Road 391, this should be sufficient to the County. The County is not concerned with issues of access to Highway 160 since the development does not access directly into the highway. Record at R1928

Three months later, when it approved the Final Plat and Final Development Plan through Resolution #2004-21, the Board identified FSR 391 as the "access" road to this *winter* resort.

The limited access allowed by FSR 391 does not constitute "access" for the Village at Wolf Creek sufficient to comply with C.R.S. § 30-28-133.1 (2004) or MCSR 2.4.1.4. The finding to the contrary by the Board is not supported by the record and is an abuse of discretion. The argument that the requirement for access is technically met by FSR 391 with the understanding real access will be forthcoming is plainly inconsistent with the statute.

It is not possible to utilize the single-lane, gravel, seasonally-closed road for the kind of services that are required in a development of this size and scope--even for its first phase. Vehicle use such as solid waste disposal, emergency medical services, law enforcement services, and liquefied natural gas services cannot be provided on this road, and thus there is not meaningful access as required by statute. *See* Mineral County Resolution #2004-21 § 4.6.11, Record at 1124.

In summary, the statutory requirement for access to a development of this scope requires a meaningful year-round ability to service a Village that will have as many as 10,000 people in it in peak season. The Board, the Joint Venture, Wolf Creek, the Forest Service and CDOT have always understood this. The process approved in Resolution #2000-13 and carried forward in Resolutions #2004-21 and 23 is careful and balances and addresses thoughtfully the myriad of problems posed for this small county by this large development. The understandable effort to enable construction to begin after seventeen years must yield to the plain meaning of the state statute, Mineral County Subdivision Regulation 2.4.1.4 and the provisions of the county's own prior resolutions. Unlike other proposed changes in conditions set forth by Resolution #2000-

13, the Board cannot waive the requirements of C.R.S. § 30-28-133.1 (2004) and MCSR 2.4.1.4. by resolution or otherwise. FSR 391 simply does not provide reasonable access. The prospect of alternate access via an undefined easement is a patently unsatisfactory foundation to approve a "final" plat. The Court concludes that the determination by the Board that access exists in compliance with the statute is unsupported by the record and constitutes an abuse of discretion and a misconstruction of the statute and the county's own subdivision regulations.

V. CONCLUSION

The Court began the analysis of this case by setting out the limited nature of the review. The Court cannot substitute its zoning philosophy or impose its judgment on the local legislative body. *Nopro Co. v. Cherry Hills Village,* 180 Colo. 217, 504 P.2d 344 (1972). This court must give also deference to the commissioners' construction of its own laws, and uphold that construction so long as there is a reasonable basis for such construction. *Abbott v. Board of County Comm'rs of Weld County*, 895 P.2d 1165(Colo. App. 1995). The rezoning in the PUD must be upheld unless it can be shown to be an abuse of discretion or in excess of jurisdiction. The Court has found that there is competent evidence to support the decisions of the Board in every respect but one.

The Court has found above that Mineral County properly followed the procedures and notice required to adopt a Final Development Plan and related decisions pursuant to C.R.S. §§ 24-67-101-108, and the Mineral County Subdivision Regulations. The Court further reviewed and found the findings and determinations of the Board are supported by competent evidence in every instance except the finding regarding access. The Court cannot and will not substitute its judgment in these matters for that of the Board.

With regard to the access for the PUD, the record does not support the decision of the Board. The decision to abandon a requirement for meaningful year-round access was arbitrary and capricious and misconstrued the state statute and the Mineral County Subdivision Regulations. The conclusion is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. For this single reason, the Court must reverse the approval of the Final Plan, Final Plat and ADNP for Phase 1, and remand the matter to the Mineral County Board of County Commissioners to conduct such further proceedings as it deems appropriate consistent with this opinion. The recorded Final Plat for the Village at Wolf Creek is vacated and the supporting resolutions for the Final Development Plan, Final Plat and ADNP for Phase 1 are similarly vacated.

At such time as the Joint Venture has obtained an adequate year-round access from the National Forest and/or Wolf Creek and confirmation that CDOT has granted a permit to access to State Highway 160 at the location of the easement, the Developer may request that Mineral County give notice of new public hearings for the Planning

Commission and the Board as required by the zoning and subdivision regulations.[4] Depending on the location of the easement(s) the plan and plat proposed may be different than the ones reviewed here. Mineral County may certainly take judicial notice of all the prior proceedings and prior determinations approved in this order.

Since the parties have disagreed concerning the construction and affect of Resolution #2000-13 in relation to C.R.S. §§ 24-67-101-108, any future proceeds should be held in a manner that would satisfy the statutory requirements of either or both § 24-67-105 or 106.

Done and Signed this 13th day of October, 2005.

Digitally signed by O.John Kuenhold
Date: 2005.10.13 08:54:47 -06'00'

BY THE COURT

O. JOHN KUENHOLD
DISTRICT JUDGE

[4] Colorado Wild suggested in its reply brief that Developer would not be able to satisfy the requirement for access from the National Forest until all appeals from the granting of an easement have been resolved citing *National Resources Defense Council v. United States Forest Service,* 421 F.3d 797 (9th Cir. 2005). While the case discusses federal court jurisdiction to hear certain appeals, the fact there can be an appeal does not mean that the parties are unable to rely upon the judgment or ruling unless prohibited from doing so by a stay or injunction.