

DISTRICT COURT, EAGLE COUNTY, COLORADO 885 Chambers Ave.; P.O. Box 597 Eagle, CO 81631	DATE FILED: October 19, 2020 2:58 PM CASE NUMBER: 2019CV30255 <b>▲COURT USE ONLY▲</b>
Plaintiffs: <b>WILLIAM ROBERT ESSIN; ANTHONY M. RYERSON; BETSEY KIEHL; DEBORAH KING FORD; and PENNY TURILLI</b>  v.  Defendants: <b>THE TOWN OF VAIL, a Colorado Home Rule Municipality; THE TOWN OF VAIL TOWN COUNCIL; and TRIUMPH DEVELOPMENT WEST, LLC, a foreign limited liability company</b>	Case No.: 2019CV30255  Div.: 3
<p style="text-align: center;"><b>ORDER AFFIRMING THE TOWN OF VAIL TOWN COUNCIL’S APPROVAL OF DEVELOPMENT APPLICATION NO. PEC 19-0018</b></p>	

THIS MATTER is before the Court on Plaintiffs’ appeal pursuant to C.R.C.P. 106(a)(4) for judicial review of development application No. PEC 19-0018 approved by the Town of Vail Town Council on October 15, 2019. On June 4, 2020, Plaintiffs William Robert Essin, Anthony M. Ryerson, Betsey Kiehl, Deborah King Ford, and Penny Turilli (collectively, “Plaintiffs”) submitted, by and through counsel, *Plaintiffs’ Opening Brief* (“Opening Brief”). On July 9, 2020, Defendants the Vail Corporation, Triumph Development West, LLC (“Triumph”), the Town of Vail (the “Town”), and the Town of Vail Town Council (“Town Council”) (collectively, “Defendants”) submitted *Defendant-Intervenor’s and Defendants’ Joint Answer Brief* (“Answer Brief”). On July 23, 2020, Plaintiffs submitted, through counsel, *Plaintiffs’ Reply to Defendant-Intervenor’s and Defendants’ Joint Answer Brief* (“Reply Brief”). On June 4, 2020, the Colorado Wildlife Federation submitted an *amicus curiae* brief in support of Plaintiffs’ appeal. Having reviewed the aforementioned briefs and being fully informed, the Court hereby issues the following Order:

## I. INTRODUCTION

Pursuant to C.R.C.P. 106(a)(4) Plaintiffs challenge the Town Council's approval of development application no. PEC 19-0018. In 2017, the Town, with the unanimous recommendation of the Town's Planning and Environmental Commission ("PEC"), rezoned a 23.3-acre parcel of real property owned by the Vail Corporation and known as Booth Heights, located at 3700 North Frontage Road East-Lot 1 in Vail, Colorado. The rezoning provides the Vail Corporation the right to develop 5.4 acres of Booth Heights, known as the East Vail Workforce Housing Subdivision, for employee housing if it meets the applicable criteria.

In 2019, the Vail Corporation entered into a Purchase and Sale Agreement with Triumph to develop the 5.4 acres. The Vail Town Code ("Town Code"), § 12-6I-11(B), provides that development plans shall be submitted to the PEC for consideration. Following a hearing, the PEC may "approve the application as submitted, application with conditions or modifications, or deny the application." Town Code, § 12-6I-11(C). Triumph submitted an application to the Town's Community Development Department and the PEC for approval of its proposed development plan which outlined the construction of a high-density employee, deed restricted, and market rate housing development (the "Application"). The proposal includes the construction of sixty-one (61) total residences comprised of thirty (30) employee housing unit apartments, nineteen (19) employee housing unit townhomes, and twelve (12) market-rate townhomes. The Application specifies that Triumph will leave undeveloped the remaining 17.9 acres of Booth Heights zoned Natural Area Preservation ("NAP") as wildlife habitat.

On August 26, 2019, the PEC approved the Application with conditions. In accordance with § 12-6I-11(C) of the Town Code, Plaintiffs appealed the PEC's decision to the Town Council. On October 15, 2019, the Town Council affirmed the PEC's approval of Triumph's Application.

Pursuant to C.R.C.P. 106(a)(4) and consistent with § 12-3-3(E) of the Town Code, Plaintiffs now seek judicial review of the Town Council's decision and request the Court to overturn its approval of the Application.

## II. STANDARD OF REVIEW

Review of quasi-judicial decisions under C.R.C.P. 106(a)(4) is “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 tribunal. C.R.C.P. 106(a)(4)(I). A governmental body exceeds its jurisdiction or abuses its discretion, and thus may be reversed, only if it applied an erroneous legal standard or if there is no competent evidence to support its decision. *City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995). In a C.R.C.P. 106(a)(4) action, no competent evidence means “that the ultimate decision of an administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308–09 (Colo. 1986). In determining whether there was an abuse of discretion, courts may consider whether there was a misinterpretation or misapplication of governing law. *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). Where the interpretation is consistent with generally applied rules of statutory construction, the administrative interpretation is entitled to deference. *See Rivera–Bottzeck v. Ortiz*, 134 P.3d 517, 521 (Colo. App. 2006); *see also Wilkinson v. Bd. of Cnty Com'rs*, 872 p.2d 1269, 1278 (Colo. App. 1993) (“[I]f there is a reasonable basis for the [b]oard's interpretation of the law, the decision may not be set aside on that ground upon review”). “In a C.R.C.P. 106 review, an agency's legal conclusions are not reviewed *de novo*, and will be affirmed if supported by a reasonable basis.” *Quaker Court LLC v. Bd. of Cnty. Commr's*, 109 P.3d 1027, 1030 (Colo. App. 2004).

### III. ANALYSIS

Plaintiffs assert that the Town Council abused its discretion by:

- (1) approving the Application notwithstanding that Triumph did not establish a system for safe pedestrian circulation to the development site;
- (2) approving the Application notwithstanding that Triumph failed to provide for the implementation of all measures necessary to mitigate the environmental impacts identified;
- (3) approving the Application notwithstanding that it did not comply with the Town of Vail's Open Lands Plan Update;
- (4) upholding, without support in the record, the PEC's decision not to require the recusal of a conflicted Commissioner; and
- (5) limiting the scope of its review of the PEC's decision in contravention of § 12-3-3 of the Town Code.

As an initial matter, Defendants assert that the Town Code limits Plaintiffs' standing on the issues appealed to the Town Council and therefore the issues raised in this C.R.C.P. 106(a)(4) action. Defendants' argument is unavailing. § 12-3-3(C) of the Town Code does not provide that a determination of standing for the purpose of reviewing PEC actions limits the standing afforded on subsequent appeal before this Court. Moreover, the appeal determination letters executed by the Community Development Director, the "administrator" under § 12-3-3(C)(2) of the Town Code, to the respective Plaintiffs state that its respective determinations of standing are "limited to this particular appeal" and "by making this determination, the Town does not waive any argument or defense that [Plaintiffs] lack standing for any subsequent appeals or resulting litigation." *See* Ex. 5 to Plaintiffs' Reply in Support of Mot. for Certification of the Record, 3, 6, 9, 12, and 31.

The Court deems it proper to consider the issues proffered by Plaintiffs and shall apply the deferential standard of review discussed *supra*.

**1. The evidence in the record supports the Town Council's finding that Triumph's development plan designed pedestrian circulation in compliance with the Town Code.**

The first issue proffered by Plaintiffs is whether the Town Council abused its discretion by approving the Application notwithstanding that Triumph did not establish a system for safe pedestrian circulation to the development site. The Town Code places a burden on an applicant when submitting a proposed development plan to comply with applicable design criteria. *See* Town Code, § 12-6I-13. The relevant criteria states, "A pedestrian and vehicular circulation system is designed to provide safe, efficient and aesthetically pleasing circulation to the site and throughout the development." Town Code, § 12-6I-13(D).

Competent evidence in the record supports the Town Council's determination that Triumph's development plan would provide safe pedestrian and vehicular access to, from, and throughout the site. The parcel has no contiguous bordering neighbors because it is surrounded by federal, state, and local property. As a result, Triumph's development plan emphasizes public transportation and reflects that the transportation for Booth Heights will differ from other developments in Vail because of its relative isolation.

Triumph commissioned a Transportation Impact Study and Parking Analysis prepared by McDowell Engineering, LLC. The study determined that the development is "anticipated to be successfully incorporated into the Town's roadway network." With input and direction from both the Public Works and CDOT, the study concluded, *inter alia*:

The approved Development Plan meets all dimensional and grading requirements of TOV Public Works, Fire Department and CDOT for vehicular access includ[ing] an oversized 26' wide private road, three fire department turnaround and staging areas, and a community driveway that takes advantage of an existing curb cut. The parking plan for each component of the development meets or exceeds the requirements of the Town Code at the PEC's direction.

Defendants assert that Triumph's plan relies in part on and improves the Town's free public transit system. This is supported by the record. The development plan states that "bus transportation can be the primary means for pedestrians to go both east and west to locations throughout the town if they do not have a car" and that Booth Heights "has direct access to [the Town's] public transit system." Presented with two options, the PEC decided that Triumph should build a bus stop at the eastern end of the development that would provide greater protection to bighorn sheep than a bus stop at the western end. The PEC then conditioned the issuance of a building permit on Triumph providing its plans for this bus stop on both the north and south side of Frontage Road and financing for such improvements. Triumph's development plan also provides "safe pedestrian access down to [the] safer and substantially improved bus stop" as well as ADA access from the center of the site down to the new bus stop. Additionally, internal pedestrian circulation is proposed along a new sidewalk on the south side of a new driveway and walkways are proposed at the south side of the multi-family buildings to provide access to the garden level residential units.

Competent evidence in the record supports the Town Council's decision that Triumph satisfied the requirement of designing a system which will provide safe pedestrian and vehicular access to and throughout the development in compliance with the Town Code, § 12-6I-13-3(D).

**2. The evidence in the record supports that Triumph's development plan provides for the implementation of all measures necessary to mitigate the environmental impacts identified.**

§ 12-6I-13(E) of the Town Code ensures that developers include in their plans measures to reduce the impact a development may have on the environment. It provides that "[e]nvironmental impacts resulting from the proposal have been identified in the project's environmental impact report, if not waived, and all necessary mitigating measures are implemented as part of the

proposed development plan.” Triumph submitted an Environmental Impact Report (“EIR” or “Report”) which identified environmental impacts to wildlife, including bighorn sheep, and impacts associated with rockfall and debris flow hazards. The EIR stated that the “parcel is located within an approximate 1,800-acre polygon of bighorn sheep winter range.” The Report stated that “[a]ll biologists agreed that the issue of potential development on the 5.4-acre parcel related to sheep was not the loss of habitat on the parcel as much as the potential for impacts (*i.e.*, displacement and reduced habitat effectiveness on nearby winter range) that could occur from East Vail parcel residents recreating in the high quality sheep winter range below the Booth Creek cliffs and in the NAP area where winter range enhancement is expected.”

Triumph submitted to the PEC an initial comprehensive Wildlife Mitigation Plan prepared by certified wildlife biologist Richard W. Thompson. As there was increased interest in protecting the sheep, and to ensure a thorough review of Triumph’s development plan and wildlife mitigation plan, the Town consulted with the Colorado Parks and Wildlife (“CPW”) and three independent wildlife biologists<sup>1</sup> for review. Triumph then collaborated with staff from the Town of Vail, CPW, Mr. Thompson, and the three wildlife biologists to revise its mitigation plan.

Triumph’s final Wildlife Mitigation Plan incorporated recommendations from the experts and included a new measure in which Triumph establishes a \$100,000 mitigation fund to be used by the Town and Town Council for the enhancement and protection of the bighorn sheep habitat. The final Wildlife Mitigation Plan also contains onsite design criteria for reducing potential wildlife impacts; winter range enhancement for bighorn sheep which include potential uses of the \$100,000 for off-site enhancement on public land recommended by the wildlife biologists, as well

---

<sup>1</sup> The three wildlife biologists are Gene Byrne, Rick Kahn, and Melanie Woolever.

as wildlife protection restrictions on future residents and enforcement measures to limit human recreation and other activities that could impact the sheep.

Evidence in the record supports that Triumph's final Wildlife Mitigation Plan provides for the implementation of all measures necessary to mitigate the environmental impacts identified.

**3. The record supports that Triumph's development plan complied with the Town of Vail's 2018 Comprehensive Open Lands Plan Update.**

The Town's applicable planning documents include the 2018 Open Lands Update. Incorporating their argument that Triumph failed to proffer in its development plan measures necessary to mitigate identified environmental impacts, Plaintiffs assert that Triumph's final Wildlife Mitigation Plan fails to comply with the 2018 Open Lands Update. They argue that Triumph "fell short of any meaningful mitigation for wildlife, amounting only to hypothetical concepts the Town might not implement, thus violating the 2018 Open Lands Plans Update's requirement and section 12-6I-13(E)." Plaintiffs state that "[t]he Town Council abused its discretion by approving the [Application] despite the absence of record evidence that Triumph and the Town had collaborated to mitigate wildlife impacts."

The 2018 Open Lands Plan Update addresses the parcel owned by the Vail Corporation. It provides that "[i]f a development application is submitted and approved, work with the land owner to establish a conservation easement on the approximate 17 acres of Natural Area Preservation property, and further mitigate for wildlife and other environmentally sensitive issues on the approximate 5 acres of developable property." As discussed *supra*, Triumph collaborated with the Town, CPW, Mr. Thompson, and the three wildlife biologists to create a plan that effectively mitigates wildlife and environmental impacts. 17.9 of the 23.3 acres of the property owned by the Vail Corporation will remain undeveloped and, at the recommendation of the three wildlife biologists, Triumph committed to placing a Conservation Easement on the NAP parcel prior to



any building permit thereby permanently restricting the parcel for wildlife and open space. The PEC also imposed as a condition of its approval of the Application that Triumph “shall work with the Town [] in good faith to pursue a conservation easement to permanently restrict the use of the 17.9-acre NAP parcel by obtaining a conservation easement from a land trust.”

The evidence in the record supports that Triumph and the Town collaborated to mitigate wildlife impacts as reflected in Triumph’s final Wildlife Mitigation Plan. The Court finds that the Town Council did not abuse its discretion by approving the Application as it complied with the 2018 Open Lands Update.

**4. The Town Council did not abuse its discretion by upholding the PEC’s decision not to require the recusal of a Commissioner.**

Plaintiffs assert that the Town Council abused its discretion by declining to review or consider information concerning a purported conflict of interest of one of the Commissioners who voted to approve the Project at the PEC hearing on August 26, 2019, and by misinterpreting or misapplying the law requiring his refusal. Plaintiffs contend that the Town Council did not sufficiently address or analyze the alleged conflict of interest as such, their decision to affirm the PEC’s approval of the Project lacks evidentiary support.

The alleged conflict of interest arises from Commissioner John-Ryan Lockman’s service as an Environmental and Sustainability Manager for Vail Resorts. Plaintiffs claim that the Town Attorney’s inquiry at the PEC’s August 26, 2019 hearing failed to satisfy the conflicts analysis prescribed by the Standards of Conduct promulgated under C.R.S. § 24-18-101, *et seq.* The Standards provide that “[a] local government official or a local government employee shall not...[p]erform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.” C.R.S. § 24-18-109(2)(b).

There is a presumption of integrity, honest, and impartiality in favor of those serving in quasi-judicial capacities. *Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983). A challenger to a proceeding on these grounds bears the burden of rebutting this presumption “by a showing that there is a conflict of interest on the part of the participating decision-maker.” *Id.* Absent a personal, financial, or official stake in the decision evincing a conflict of interest on the part of the Commission member, a reviewing court should hold that the hearing was conducted impartially. *Id.* at 228. “The ultimate question is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010) (internal citations omitted).

Plaintiffs have failed to meet their burden of rebutting the presumption by demonstrating that Commissioner Lockman had a conflict of interest in voting on the Project. There is nothing in the record showing that Commissioner Lockman would receive any financial benefit, however indirect, from the Project. At the August 26, 2019 hearing, in response to the Town Attorney’s inquiries relating to a letter stating that Commissioner Lockman had a potential conflict of interest, the Commissioner stated that he works as an Environmental and Sustainability Manager for Vail Resorts, there was no influence from his employer, his employment would not be impacted as a result of the hearing, and he would not receive any compensatory benefit as a result of the hearing. Commissioner Lockman also stated that he could remain impartial given his employment status. Neither the PEC nor the Chair required his recusal.

Defendants maintain that Plaintiffs failed to preserve this issue pursuant to Section 12-3-3(C) and therefore it was not before the Town Council at its hearing on October 15, 2019. The

record reflects that the Town Attorney at the hearing explained that Commissioner Lockman “had been advised,” the related “issues determined and decided,” and it was “not an issue tonight.” Notwithstanding the issue of preservation on appeal, Plaintiffs proffer that the Town Council’s review on appeal as *de novo* (“The Town Council’s standard for reviewing PEC decisions is thus *de novo*”). The record demonstrates that the Town Council independently reviewed the PEC’s determination that Triumph’s application satisfied the criteria in Title 12, Chapter 6, Article I of the Town Code. As such, the subsequent substantive review of the Project by the seven (7) Town Council members, none of whom Plaintiffs allege had a conflict, cured any potential conflict of interest by Commissioner Lockman.

The record supports and the Court finds that the Town Council did not abuse its discretion by upholding the PEC’s decision not to require the recusal of a Commissioner.

**5. The Town did not misapply the law relating to its review of the PEC’s decision in contravention of § 12-3-3 of the Town Code.**

Plaintiffs assert as their final argument that the Town Council improperly curtailed the scope of its review authority, as afforded by the Town Code, and allowed its decision to be influenced by an erroneous interpretation of the law of regulatory takings. Plaintiffs postulate that this derived from a misapplication or misconstruction of governing law, and thus amounted to an abuse of discretion. Plaintiffs base this argument on the Town Attorney’s statement at the PEC hearing that the “purview of this hearing is a determination solely on whether the...planning commission committed error or not when they applied the town code to this particular application?” Plaintiffs maintain that this statement contradicts the *de novo* standard required by the Town Code. They argue that the Town Council thus misapplied or misinterpreted the governing law and improperly declined to exercise its authority to conduct an independent review

and uphold, uphold with modifications, or overturn the PEC's decision thereby limiting itself to approving or overturning the PEC's decision.

The Town Council's review of the PEC's decision is in an appellate capacity. § 12-3-3(C)(1) of the Town Code provides that "[t]he town council shall have the authority to hear and decide appeals from any decision, determination, or interpretation by the [PEC]." The Town Code does not specify a standard of review or other particular guidance regarding these appeals. On October 15, 2019, prior to the appeal hearing before the Town Council, the Community Development Director provided a memorandum which stated that "[t]he question to be answered by the [] Town Council regarding this appeal is "[s]hould the August 26, 2019 decision of the Planning and Environmental Commission be upheld?" It then more particularly stated that "Pursuant to Section 12-3-3, Vail Town Code, the Vail Town Council must uphold, uphold with modifications, or overturn the [PEC's] August 26, 2019, decision."

The Court finds that the Town Attorney's statement did not impact the scope of the Town Council's review. The record supports that the Town Council engaged in a *de novo* review.

Based on the Record, the Court finds that the Town Council neither exceeded its jurisdiction nor abused its discretion in its decision to approve Triumph's Application. Accordingly, the Court affirms the Town Council's adoption of development application No. PEC 19-0018.

#### IV. ORDER

IT IS ORDERED:

The Court hereby AFFIRMS the Town Council's adoption of development application No. PEC 19-0018.

So Ordered this 19<sup>th</sup> day of October 2020.

BY THE COURT:



---

Russell H. Granger  
District Court Judge