





***Certificate of Conferral re C.R.C.P. 121 § 1-15:*** The undersigned conferred with opposing counsel regarding this motion, which they take no position on.

1. On January 24, 2025, Castle Pines North filed its Brief with Exhibits A and B regarding its position in this dispute.

2. On February 6, 2025, the City Council for the City of Castle Pines filed its Motion to Disregard Intervenor's Conflict of Interest Argument.

3. The Castle Pines North's Response was due on February 27, 2025.

4. Unfortunately, due to a recent death in the family of the undersigned's paralegal when the Motion was filed, the deadline was not calendared and subsequently missed.

5. CRCP 6(b) allows for an expansion of time of the specified period permit the act to be done "where the failure to act was the result of excusable neglect."

6. "Excusable neglect" occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable hindrance or accident. *Moyer v. Empire Lodge Homeowner's Assoc.*, 78 P.3d 313, 315 (Colo. 2003).

7. Given that the personal tragedy of the loss of a loved one of the undersigned's paralegal unfortunately caused the overlook of the required response deadline, the Association respectfully submits that excusable neglect has been met.

8. Given the important issues to be decided on this appeal, allowing for a full briefing on the City's motion will ensure all matters are properly adjudicated.

9. Permitting the response will not prejudice the parties to this action.

WHEREFORE, The Defendant-Intervenor Castle Pines North Homeowners Association, No. 1 respectfully moves this Court to accept its Response to the City Council for the City of Castle Pines filed its Motion to Disregard Intervenor's Conflict of Interest Argument as filed, and for such further relief as the Court may deem just and proper.

Respectfully submitted this 9th day of March, 2025.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt

Jonah G. Hunt, No. 34379

Marcus T. Wile, No. 49471

*Attorneys for The Castle Pines North Homeowners Association, No. 1*

### **CERTIFICATE OF SERVICE**

I hereby certify that on March 9, 2025, a true and correct copy of the foregoing was served via LexisNexis/CCEF/U.S. Mail/Email upon all counsel of record.

/s/ Chris A. Cowlishaw

Chirs A. Cowlishaw, Litigation Paralegal

DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED March 07, 2025 4:31 PM	
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No.: 2024CV30582  Div.: 6	
<i>Attorneys for The Castle Pines North Homeowners Association, No. 1:</i> ORTEN CAVANAGH HOLMES & HUNT, LLC Jonah G. Hunt, No. 34379 Marcus T. Wile, No. 49471 Address: 1445 Market Street, Suite 350 Denver, CO 80202 Phone Number: (720) 221-9780 Fax Number: (720) 221-9781 Email: <a href="mailto:jhunt@ochhoalaw.com">jhunt@ochhoalaw.com</a>		
<p style="text-align: center;"><b>DEFENDANT-INTERVENOR THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1’S MOTION FOR LEAVE TO FILE RESPONSE</b></p>		

Defendant-Intervenor The Castle Pines North Homeowners Association, No. 1

(“Association” or “Castle Pines North”), by and through its counsel Orten Cavanagh Holmes & Hunt, LLC, hereby moves this Court for leave to file its Response pursuant to C.R.C.P. 6(b)(2), and states as follows:

***Certificate of Conferral re C.R.C.P. 121 § 1-15:*** The undersigned has attempted to confer with the parties regarding this Motion. Counsel has received a response from counsel for the Defendant City Council for the City of Castle Pines, who takes no position on this motion. The undersigned did not receive a response from counsel for the Plaintiff CP Commercial regarding this motion.

1. On January 24, 2025, Castle Pines North filed its Brief with exhibits A and B regarding its position in this dispute.

2. On February 6, 2025, the City Council for the City of Castle Pines filed its Motion to Disregard Intervenor's Conflict of Interest Argument.

3. The Castle Pines North's Response was due on February 27, 2025.

4. Unfortunately, due to a recent death in the family of the undersigned's paralegal when the Motion was filed, the deadline was not calendared and subsequently missed.

5. CRCP 6(b) allows for an expansion of time of the specified period permit the act to be done "where the failure to act was the result of excusable neglect."

6. "Excusable neglect" occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable hindrance or accident. *Moyer v. Empire Lodge Homeowner's Assoc.*, 78 P.3d 313, 315 (Colo. 2003).

7. Given that the personal tragedy of the loss of a loved one of the undersigned's paralegal unfortunately caused the overlook of the required response deadline, the Association respectfully submits that excusable neglect has been met.

8. Given the important issues to be decided on this appeal, allowing for a full briefing on the City's motion will ensure all matters are properly adjudicated.

9. Permitting the response will not prejudice the parties to this action.

WHEREFORE, The Defendant-Intervenor Castle Pines North Homeowners Association, No. 1 respectfully moves this Court to accept its Response to the City Council for the City of Castle Pines filed its Motion to Disregard Intervenor's Conflict of Interest Argument as filed, and for such further relief as the Court may deem just and proper.

Respectfully submitted this 7th day of March, 2025.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt

Jonah G. Hunt, No. 34379

Marcus T. Wile, No. 49471

*Attorneys for The Castle Pines North Homeowners Association, No. 1*

### **CERTIFICATE OF SERVICE**

I hereby certify that on March 7, 2025, a true and correct copy of the foregoing was served via LexisNexis/CCEF/U.S. Mail/Email upon all counsel of record.

/s/ Chris A. Cowlshaw

Chirs A. Cowlshaw, Litigation Paralegal

DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED March 07, 2025 4:31 PM	
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	▲ COURT USE ONLY ▲ Case No.: 2024CV30582  Div.: 6	
<p style="text-align: center;"><b>ORDER REGARDING THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S MOTION FOR LEAVE TO FILE RESPONSE</b></p>		

THIS MATTER comes before the Court upon Defendant-Intervenor The Castle Pines North Homeowners Association, No. 1 (“Association” or “Castle Pines North”) Motion for Leave to File Response, and after the Court having been fully advised in the premises;

HEREBY ORDERS that the Association’s Motion for Leave to File Response is GRANTED. The Court accepts the Association’s Response filed as *Exhibit A* to the Motion on the Court’s docket.

BY THE COURT:

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District Court Judge



DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	<div data-bbox="1049 302 1365 359" data-label="Text"> DATE FILED  February 07, 2025 7:15 PM </div> <div data-bbox="972 957 1386 993" data-label="Text"> ▲ COURT USE ONLY ▲ </div>
<div data-bbox="204 552 899 678" data-label="Text"> <b>Plaintiff:</b>  CP COMMERCIAL, LLC, a Colorado limited liability company, </div> <div data-bbox="204 730 233 758" data-label="Text"> v. </div> <div data-bbox="204 800 781 919" data-label="Text"> <b>Defendant:</b>  CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO, and </div> <div data-bbox="204 957 834 1037" data-label="Text"> <b>Intervenor:</b> CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1 </div>	
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<div data-bbox="566 1696 1055 1732" data-label="Section-Header"> <b>PLAINTIFF’S REPLY BRIEF</b> </div>	

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the requirements of C.A.R. 28 and 32 to the extent such requirements are consistent with and/or applicable to the Colorado Administrative Procedures Act, C.R.S. § 24-4-106. Specifically, the undersigned certifies that:

**The brief complies with the formatting requirements set forth in C.A.R. 28(a).**

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

It contains 5,699 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28.**

*s/David B. Meschke*

David B. Meschke

## **TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
STANDARD OF REVIEW .....	3
ARGUMENT .....	5
I.    The City Council Abused Its Discretion In Denying the SIP Under the Health, Safety, and Welfare Approval Standard Based On Perceived Flaws with the Traffic Study.....	6
II.   The HOA and the City Council Make Additional Irrelevant and Misleading Arguments. ....	11
III.  The City Council’s and the HOA’s Cited Support for the SIP’s Denial Improperly Relate to the Proposed Use. ....	14
A.    The City Council Improperly Cites to the Nature of Fast-Food Restaurants to Justify the SIP’s Denial.....	15
B.    The HOA’s Argument that the City Council Can Deny the SIP Based On Its Proposed Use Would Violate CP Commercial’s Property Rights. ....	19
IV.   The HOA and the City Council Misconstrue the Other Flaws CP Commercial Identified.....	21
A.    The Comprehensive Plan Goals Cited in the Resolution Have Questionable Applicability. ....	22
B.    The City’s Prior Approval of the Planned Development Is Relevant. ....	24
V.    The City Council and the HOA Fail to Identify Any Competent Evidence Supporting the SIP’s Denial. ....	25
CONCLUSION .....	26

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>4411 Storm Mountain LLC v. Larimer Cnty.</i> , Case No. 2023CV30694, 2024 WL 2240776 (Colo. Dist. Ct. Apr. 1, 2024) .....	4
<i>Canyon Area Residents for the Env. v. Bd. of Cnty. Comm'rs of Jefferson Cnty.</i> , 172 P.3d 905 (Colo. App. 2006).....	25
<i>City of Colo. Springs v. Givan</i> , 897 P.2d 753 (Colo. 1995).....	3, 4
<i>Colo. Mun. League v. Mountain States Tel. &amp; Tel. Co.</i> , 759 P.2d. 40 (Colo. 1988).....	3, 4
<i>Eason v. Bd. of Cnty. Comm'rs of Cnty. of Boulder</i> , 70 P.3d 600 (Colo. App. 2003).....	20
<i>Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't</i> , 196 P.3d 892 (Colo. 2008).....	4
<i>IBC Denver II, LLC v. City of Wheat Ridge</i> , 183 P.3d 714 (Colo. App. 2008).....	14
<i>Johnson v. Dep't of Safety</i> , 503 P.3d 918 (Colo. App. 2021).....	4
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020).....	4
<i>Ross v. Fire &amp; Police Pension Ass'n</i> , 713 P.2d 1304 (Colo. 1986).....	4
<i>Save Our St. Vrain Valley, Inc. v. Boulder Cnty. Bd. of Adjustment</i> , 491 P.3d 562 (Colo. App. 2021).....	12

<i>Whitelaw v. Denver City Council</i> , 405 P.3d 433 (Colo. App. 2027).....	7, 14
---	-------

## **Statutes**

Castle Pines, Colo., Municipal Code .....	2, 9, 10, 12, 17, 19, 20, 24, 25
City Pines Zoning Ordinance, § 15.....	9
Castle Pines Zoning Ordinance, § 27-2703.01 .....	2, 19
Castle Pines Zoning Ordinance, § 27-2704.06 .....	17
Castle Pines Zoning Ordinance, § 27-2807.32 .....	19

## **Rules**

C.R.C.P. 106(a)(4) .....	3, 4, 13, 25
--------------------------	--------------

## **Other Authorities**

City of Castle Pines, <i>Land Use Controls and Private Property Rights</i> (Feb. 2, 2024 3:40 PM), <a href="https://www.castlepinesco.gov/land-use-controls-and-private-property-rights/">https://www.castlepinesco.gov/land-use-controls-and-private-property-rights/</a> .....	15
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## **INTRODUCTION**

Defendant City Council for the City of Castle Pines, Colorado (“City Council”) and Intervenor The Castle Pines North Homeowners Association No. 1 (the “HOA”) sidestepped the fundamental flaws in the City Council’s decision to deny CP Commercial, LLC’s (“CP Commercial”) site improvement plan for a fast-food restaurant (the “SIP”), including that the City Council:

- Could not base its denial on the proposed fast-food restaurant use;
- Misunderstood the scope of its review of the SIP;
- Cherry-picked several inapplicable goals and objectives in the Comprehensive Plan;
- Overlooked its prior determinations in approving the planned development for the area;
- Analyzed the SIP’s traffic impact study (the “Traffic Study”) under the wrong Approval Standard;
- Effectively created new traffic standards contrary to the City of Castle Pines’ (the “City”) code; and
- Did not rely upon competent evidence, as opposed to irrelevant or false statements.

They instead misconstrue CP Commercial’s arguments, argue for an overly narrow reading of the standard of review, address extraneous considerations, and rely on irrelevant zoning decisions. Even more troubling, the City Council and the HOA

repeat the false notion that the City Council could deny the SIP because of traits inherent to its proposed fast-food restaurant use.

The City Council's scope of review was limited—it simply had to assess whether the SIP for property already zoned to allow a “restaurant/fast-food establishment” use by right met the five approval standards in Paragraph 2703.01 of Section 27 of the City's Zoning Ordinances (the “Approval Standards”). Anything outside that scope is irrelevant. Despite this, the City Council and the HOA cite “evidence” in the record that a fast-food restaurant does not support certain “walkability” and “community” goals in the City's Comprehensive Plan (the “Comprehensive Plan”). None of it is competent evidence. And the City Council and the HOA offer little in substance in support of the City Council's other cited reason for denial—that the Traffic Study should have met additional, unstated requirements and thus somehow does not further the community's health, safety, and welfare.

Simply put, the City Council adopted Resolution No. 24-39 (the “Resolution”) and denied the SIP separate from whether it met the Approval Standards. It thus logically follows that the City Council made its decision because the SIP proposed a McDonald's opposed by a vocal contingent of neighbors—an abuse of discretion.

## **STANDARD OF REVIEW**

The City Council contests CP Commercial's articulation of the applicable standard of review for Rule 106 actions, despite consensus among Colorado courts. *See, e.g., City of Colo. Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995) (explaining the standard for a Rule 106(a)(4) appeal includes whether there is competent evidence to support the decision). The City Council's goal in doing so is transparent. It wants to provide the impression that this Court must affirm the City Council's decision if anything in the record can be cited to support the City Council's two grounds for denying the SIP, regardless of whether such "evidence" is irrelevant or rises to the level of "competent evidence."

The City Council accuses CP Commercial of "misstat[ing] the applicable standard" and improperly suggesting that this Court should consider and reweigh competing evidence in the record. This is false. Rather, the "offending" statement CP Commercial quotes regarding the meaning of competent evidence comes directly from the Colorado Supreme Court, where that Court, itself quoting from the U.S. Supreme Court, articulated that competent evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See* Opening Br. at 23–24 (quoting *Colo. Mun. League v. Mountain States Tel. & Tel. Co.*, 759 P.2d. 40, 44 (Colo. 1988)). Indeed, the case relied upon by the City Council for the



standard of review—*Johnson v. Dep’t of Safety*, 503 P.3d 918, 922 (Colo. App. 2021)—quotes the *very same* sentence from *Colorado Municipal League* two paragraphs after the paragraph quoted in its Answer Brief.<sup>1</sup> The corollary, which the City Council and the HOA both quote from, is that no competent evidence exists in the record when the decision is “so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Freedom Colo. Info., Inc. v. El Paso Ctny. Sheriff’s Dep’t*, 196 P.3d 892, 900 (Colo. 2008); *Ross v. Fire & Police Pension Ass’n*, 713 P.2d 1304, 1309 (Colo. 1986).

The Colorado Supreme Court’s articulation of what *is* competent evidence, as opposed to what *is not*, makes logical sense. The adjective “competent” must have meaning, otherwise courts would not use it. *See Ramos v. Louisiana*, 590 U.S. 83, 104 (2020) (highlighting “an old truth” that it is usually a judicial decision’s reasoning that allows it to have life and effect in the disposition of future cases). Thus, a court tasked with review under Rule 106(a)(4) must ascertain from the record if the purported evidence in support is “competent evidence.” A decision otherwise

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<sup>1</sup> This competent evidence definition has since been quoted by subsequent Colorado district and appellate courts in the Rule 106(a)(4) context. *See, e.g., Givan*, 897 P.2d at 756; *4411 Storm Mountain LLC v. Larimer Cnty.*, Case No. 2023CV30694, 2024 WL 2240776, at \*7 (Colo. Dist. Ct. Apr. 1, 2024).

could withstand scrutiny simply by citing to “evidence” that is irrelevant, fabricated, or outright false.

Therefore, to obtain affirmance, the record must contain relevant evidence that a reasonable mind might accept as adequate to support the two grounds in the Resolution. If the record is devoid of such evidence, which is the case here, the City Council abused its discretion and its decision must be overturned.

### **ARGUMENT**

The City Council’s Resolution cites to two specific grounds for denial: (1) the SIP’s purported failure to support certain goals and objectives of the Comprehensive Plan; and (2) that the Traffic Study contains alleged flaws that do not further the public health, safety, and welfare. Nothing identified in the Answer Briefs supports these grounds.

In an attempt to salvage the City Council’s decision, the City Council and HOA devote little attention to the second ground and instead principally argue that the proposed McDonald’s does not support the Comprehensive Plan’s goals of walkability and community. The City Council and the HOA also raise irrelevant considerations or misconstrue CP Commercial’s arguments. Nothing they state overcomes that the City Council relied upon irrelevant considerations and misapplied the City’s code.

**I. The City Council Abused Its Discretion In Denying the SIP Under the Health, Safety, and Welfare Approval Standard Based On Perceived Flaws with the Traffic Study.**

CP Commercial has identified four reasons why the City Council abused its discretion in denying the SIP on the basis that the Traffic Study does not further the public health, safety, and welfare:

1. The City Council analyzed the Traffic Study under the wrong Approval Standard;
2. The City Council's denial creates new traffic standards contrary to the City's code;
3. The decision is contrary to the previously approved Parkway Plaza Planned Development ("Parkway Plaza PD"); and
4. No competent evidence supports the perceived flaws with the Traffic Study.

Rather than address these directly, the City Council and the HOA argue that the City Council could properly address preexisting concerns with traffic under the health, safety, and welfare Approval Standard.

First, in arguing that traffic issues affect the health, safety, and welfare, both the City Council and the HOA conflate "traffic" concerns with the proposed development with additional information they believe should have been included in the Traffic Study. The two are distinct. CP Commercial is not arguing that traffic considerations may be analyzed only for compliance with technical standards, as the

City Council insists. (*See* City Council’s Answer Br. at 15.)<sup>2</sup> Rather, CP Commercial’s point is that although technical requirements for the Traffic Study are governed under a separate Approval Standard, the Resolution states that the Traffic Study itself did not include certain information it should have and thus the SIP did not further the health, safety, and welfare. The Resolution does not, for example, state that the results of the Traffic Study showed that the SIP would create traffic issues, which may very well go to the health, safety, and welfare of the community. The City Council’s rationale is thus arbitrary and capricious.

Second, neither the City Council nor the HOA address CP Commercial’s argument that the City Council’s denial effectively creates new traffic standards. There is no valid response. As previously described, the City Council agreed in the Resolution that the SIP met the fourth Approval Standard, which covers technical standards and requirements such as the “Traffic Impact Study Criteria” within the City’s Roadway Design & Construction Standards. (*See* Opening Br. at 36–39; CastlePines-1747, 1901.) Indeed, the City Council did not identify any requirement

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<sup>2</sup> The City Council cites to *Whitelaw v. Denver City Council*, 405 P.3d 433, 444 (Colo. App. 2027), to support its argument that a governmental body may consider traffic when analyzing under a public health, safety, and welfare criterion. Not only does this argument miss the mark because it conflates traffic issues with technical requirements for a traffic study, but *Whitelaw* addressed issues with traffic and parking associated with rezoning, not approval of a site improvement plan..

within the City’s “Traffic Impact Study Criteria” that was not met. Nevertheless, the Resolution states that the study should have explicitly covered “traffic from door dash and other food delivery services,” “school uses surrounding the site,” “delivery trucks, fire trucks and their ability to access the site,” “employee parking,” and “additional consideration or rationale of the model in relation to actual driving patterns.” (CastlePines-1901.) None of these are explicit requirements for a traffic study under the code. (*See also* Opening Br. at 41–44 (explaining that the Traffic Study covered those concerns and that a different part of the City’s code addressed employee parking (and the SIP met those requirements).) Instead, by denying the SIP under a different Approval Standard, the City Council effectively conjured new requirements under the guise of “health, safety, and welfare.”<sup>3</sup>

Worse, the City Council and the HOA utterly ignore that the City Council appears to be instituting a new approval standard that would allow it to deny any new SIP if the planned development would increase traffic *at all* when there is a preexisting traffic problem with the adjoining road network. (*See* Opening Br. at 38–39.) This is not an argument that the City Council’s decision was pretextual, as the

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<sup>3</sup> In fact, the HOA further proves this point in arguing that the Traffic Study was “artificially narrow in scope,” and then listing topics beyond those cited in the Resolution that the HOA believes should have been addressed. (HOA’s Answer Br. at 10–11.)

City Council postulates. Rather, it shows that the City Council arbitrarily abused its discretion by misapplying its own code.

Third, the City Council still fails to grasp the significance of the City's prior approval of the Parkway Plaza PD.<sup>4</sup> As previously described, the planned development application included a traffic study that showed *more* peak hour trip generation for certain planned uses for the planned development than the Traffic Study submitted with the SIP one year later with different uses, including the McDonald's, for the planned development. (*See* Opening Br. at 33–35.) As part of this approval, the City specifically stated that the development plan “further[s] the public health, safety, convenience and general welfare of the community and meet[s] the criteria of approval set forth in Section 15 of the Zoning Ordinance.” (CastlePines-1766–67.) And, one of the approval criteria for planned development rezoning is “whether the intended land use would create traffic congestion or burden the existing road network.” (CastlePines-1721.)

Therefore, setting aside whether the City Council reviewed the Traffic Study under the correct Approval Standard (and it did not), the City Council reversed course only *one year* after: (1) approving the Parkway Plaza PD to block a SIP for a lot within that planned development on the basis that a traffic study showing *less*

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<sup>4</sup> The HOA does not address this topic in its Answer Brief.

peak trip generation did not further public health, safety, and welfare; and (2) previously determining that the Parkway Plaza PD furthered the public health, safety, convenience and general welfare of the community. Although the City Council correctly states that this prior approval did not automatically require it to approve the SIP under the health, safety, and welfare Approval Standard, (*see* City Council’s Answer Br. at 14), the fact that the City Council denied the SIP based on traffic concerns when it previously approved the planned development based on higher peak trip generation further demonstrates why the City Council misapplied the code, fabricated reasons to deny the SIP, and otherwise abused its discretion.

Fourth, even if the City Council correctly analyzed the Traffic Study under the Approval Standards, no competent evidence supports denial. Neither the City Council nor the HOA refute CP Commercial’s detailed description why the supposed “evidence” supporting the City Council’s decision is irrelevant, misrepresents the record, or is simply false. (*See* Opening Br. at 41–44.) Instead, the City Council argues that the Court cannot “reweigh” or even question any statement in the record, and the HOA supplies additional concerns regarding traffic not cited in the Resolution. Tellingly, none of the City Council’s citations to the record are in support of this Approval Standard.

By misapplying its code, creating new traffic study requirements, overlooking its prior approval of the planned development, and ignoring the competent evidence, the City Council abused its discretion in denying the SIP under this Approval Standard.

**II. The HOA and the City Council Make Additional Irrelevant and Misleading Arguments.**

Not only do the HOA and the City Council fail to save the Resolution's second ground for denial, but they distract and deflect with other statements and arguments beyond this Court's review.

The HOA primarily makes irrelevant arguments that, at times, misconstrue CP Commercial's Opening Brief. Among others, the HOA states that:

- The City Council did not abuse its discretion in denying the SIP because the HOA identified additional goals and objectives in the Comprehensive Plan that the SIP allegedly does not meet and additional ways in which the SIP allegedly fails to support the public health, safety, and welfare of the community;
- Public citizens had the right to comment on the SIP;
- The City Council was not obligated to follow staff recommendations;
- Certain information regarding the proposed drive-through should have been voluntarily disclosed in the SIP application process;
- The proposed McDonald's would give rise to statutory and common law claims of nuisance; and
- City Council had conflicts of interest.



First, the HOA argues that the City Council did not abuse its discretion because the HOA identified in correspondence with the City Council over 20 alleged deficiencies with the SIP related to either the Comprehensive Plan’s goals and objectives or the public health, safety, and welfare. (*See* HOA’s Answer Br. at 5–6.) But most, if not all, of them are irrelevant because the City Council did not deny the SIP on those grounds. *See, e.g., Save Our St. Vrain Valley, Inc. v. Boulder Cnty. Bd. of Adjustment*, 491 P.3d 562, 567 (Colo. App. 2021) (a governmental body “abuses its discretion when *its decision* is . . . arbitrary and capricious”) (emphasis added). Although the City Council denied the SIP as to two Approval Standards, it did so specifically based on: (1) a supposed failure to meet Economic Development Goal 2.3 and Land Use Goals 2.1 and 2.2; and (2) the belief that the traffic study contained alleged deficiencies. (CastlePines-1900–01.) The HOA, in contrast, identified supposed failures to meet different goals. (*Compare* HOA’s Answer Br. at 5 with CastlePines-1900.) The HOA’s alleged additional “deficiencies” are thus outside the scope of this appeal and must be rejected.

Next, CP Commercial agrees that public citizens have the right to comment on the SIP and that City Council did not have to follow the staff’s recommendation to approve the SIP. Rather, the HOA misunderstands CP Commercial’s arguments that certain public comment objectively does not rise to the level of competent

evidence because it is irrelevant or demonstrably false, (*see infra* §§ III–V; *see also* Opening Br. at 40–44), and that the City Council’s departure from staff’s recommendation corroborates the absence of competent evidence supporting the denial. (*Compare* HOA’s Answer Brief at 7–9 *with* Opening Br. at 11–13, 22, 31, 37, 40–44.)

As to the HOA’s complaint that the SIP should have voluntarily disclosed certain information related to the proposed drive-through, (*see* HOA’s Answer Br. at 10–11), this would only be relevant to the extent that the City Council relied upon the alleged lack of disclosure in denying the SIP.

Lastly, the final two bullets are so far outside the scope of this Rule 106(a)(4) appeal that their inclusion in the HOA’s Answer Brief defies credulity. (*See* HOA’s Answer Br. at 7, 12–14.) The HOA does not explain how approval of the SIP would cause a nuisance or why that is remotely relevant to this appeal. It is also unclear why the HOA is arguing conflicts of interest while also seeking affirmance. Regardless, the documents the HOA supplies in support of its “conflict of interest” argument are not only absent from the record, and therefore should be disregarded by this Court, but they do not even support the conflicts the HOA states were present.

The City Council makes similar, if less numerous, arguments. In addition to misconstruing the standard of review, the City Council attempts to brush aside

councilmembers’ biases against a McDonald’s in stating that “courts generally will not consider claims that a government body acted for hidden or pretextual reasons.” (City Council’s Answer Br. at 9.) But the cases cited by the City Council in support reason that where there is competent evidence supporting a decision-making body’s decision, a court will not examine whether the decision may have been motivated by improper considerations. *See IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 716–17, 20 (Colo. App. 2008); *Whitelaw v. Denver City Council*, 405 P.3d 433, 440 (Colo. App. 2017). Obviously, courts will consider pretext when there is no competent evidence.

If no competent evidence supports the City Council’s denial, then the City Council’s cited reasons are merely pretextual to hide the councilmembers’ true motivations. Indeed, CP Commercial quoted and cited a plethora of statements from councilmembers and the public demonstrating their biases and objections to a McDonald’s. (*See* Opening Br. at 16–22.)

### **III. The City Council’s and the HOA’s Cited Support for the SIP’s Denial Improperly Relate to the Proposed Use.**

Instead of addressing the fundamental flaws inherent to the City Council’s decision, both the HOA and the City Council fell into the trap of arguing that traits inherent to the proposed use—a McDonald’s fast-food restaurant—support the City Council’s denial of the SIP. “Restaurant/fast-food establishment” is a principal use

for the Property, and has been that way both before and after the City Council approved the plan for the greater Parkway Plaza PD. (*See* Opening Br. at 4–6; CastlePines-0109, 1475.) Because of that, the Property’s use is outside the scope of the SIP’s review. Indeed, the City’s own website provides that “[i]f the zoning accommodates the proposed land use, the City is obligated to support that land use, accept an application for development, and has no authority to determine the type of business or a preference of a specific business over another.”<sup>5</sup>

**A. The City Council Improperly Cites to the Nature of Fast-Food Restaurants to Justify the SIP’s Denial.**

The City Council’s principal argument is that the SIP does not satisfy the Comprehensive Plan’s goals of walkability, high quality development, and creating a sense of community, as cited by the Resolution. (City Council’s Answer Br. at 6–11.) The heart of the City Council’s argument is that a drive-through undermines those goals because it encourages vehicular use rather than community members sitting down for meals together. It then contends that a drive-through is not an inherent trait to fast-food restaurant use because not all fast-food restaurants have drive-throughs. The City Council’s reasoning should be rejected.

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<sup>5</sup> City of Castle Pines, *Land Use Controls and Private Property Rights* (Feb. 2, 2024 3:40 PM), <https://www.castlepinesco.gov/land-use-controls-and-private-property-rights/>.

First, the City Council argues that because the proposed McDonald's would have an emphasis on drive-through business, the City Council was within its discretion to deny the SIP. This argument lacks merit. The City Council's attempt to distinguish between fast-food restaurants with and without drive-throughs—and in the process incorrectly references fast *casual* restaurants such as Subway, Jersey Mike's, and Little Caesars—is irrelevant because of the nature of fast-food restaurants. Regardless of whether the restaurant primarily receives its business from drive-throughs or a counter inside, customers are likely to drive to the restaurant because they want to obtain the food *fast* and go somewhere else. The customers can then take that food and eat it with other community members. Thus, the City Council's rationale that drive-throughs do not encourage walkability or a sense of community is actually a reference to fast-food restaurant use as a whole, which cannot be a basis for denial. It has nothing to do with a site improvement plan. Indeed, the City's code does not prohibit a drive-through; rather, the code requires a certain number of stacking spaces in a drive-through lane, which the SIP meets. (*See* CastlePines-0107.)

Second, and similarly, the City Council argues that the lack of an outdoor eating space is a basis for denial. It contends that some fast-food restaurants include an outdoor patio, and thus the SIP's lack of outdoor seating is counter to the

Comprehensive Plan’s goals of walkability and sense of community. This argument, however, ignores that the SIP does not propose outdoor seating to specifically address one of City Council’s concerns—the potential to attract non-customers to the location. (*See* CastlePines-1583–84). Indeed, the applicant revised the SIP to remove the proposed outdoor seating in compliance with Paragraph 2704.06 of Section 27 of the City’s Zoning Ordinances, which governs submittal of revised plans based on staff and referral comments. Further, this alleged basis again goes to the proposed use for the site. The City Council would be effectively utilizing this Approval Standard to create additional technical requirements, such as use standards, for approval. In fact, if the City Council could deny site improvement plans on this ground, then it could arbitrarily discriminate which fast-food businesses would be permitted (*i.e.*, only those whose business plans include robust outdoor seating), which is exactly what residents advocated for.

Third, as anticipated, the City Council also argues that “the effects of the proposed restaurant” support its decision. (*See* City Council’s Answer Br. at 6–7.) The City Council specifically cites to public comment that someone, including potentially children, may be struck crossing the busy streets surrounding the site of the proposed McDonald’s. But these relate to the existing problems with the roadway that are separate from whether a site improvement plan meets the applicable

standards. In fact, any development on the site that attracts customers, including restaurants, retail, or other services, has the potential to interact with these existing problems. (*See* CastlePines-1688–89.) And the City already approved zoning for development at the site with the Parkway Plaza PD, which included *more* traffic generation. (CastlePines-0776, 1763–71.) The logic behind the City Council’s argument would require the SIP to include something akin to above-ground walkways over nearby busy streets to be approved, even though CP Commercial does not own the property rights to implement it and the City does not have the power to mandate it. The City Council’s point is irrelevant.

Fourth, the City Council does not contest CP Commercial’s argument that “high quality development” likewise refers to the nature of the proposed use. It provides no evidence that the proposed McDonald’s would not be high quality development for a fast-food restaurant. Instead, the Resolution’s reference to “high quality” exhibits a preference for certain types of restaurants over others.

Finally, the City Council cites to public testimony to support the notion that the proposed McDonald’s would not encourage walkability or be a community builder. But the quotes in the record exhibit a preference for a different type of development—not a fast-food restaurant. (*See* City Council’s Answer Br. at 6–8 (citing to comments suggesting “a better idea for providing a gathering space for the

community,” imploring City council to oppose the SIP “and any similar uses,” and stating that “a 24 hour fast food restaurant does not add to the enjoyment of those who use the park, trails, and sidewalks”)). These comments thus all go to the proposed fast-food restaurant use, are outside the scope of the City Council’s review, and thus cannot be cited as competent evidence.

**B. The HOA’s Argument that the City Council Can Deny the SIP Based On Its Proposed Use Would Violate CP Commercial’s Property Rights.**

The HOA, on the other hand, misconstrues the meaning of a principal use by right and argues that the City Council is permitted to deny the SIP on the basis of the Property’s proposed use. (HOA’s Answer Br. at 3–7.) The HOA cites to two sources: (1) Section 2703.01(b) of the City’s Zoning Ordinances, which includes as an Approval Standard (not one of the two standards cited by the City Council in support of its decision) whether the SIP is consistent with development and use *standards*; and (2) the fact that the Comprehensive Plan includes statements related to land use. Neither supports the HOA’s argument.

First, there is a difference between a property’s approved proposed use and an application’s compliance with development and use standards, which are rules that limit or control certain land uses. For example, the SIP had to, and does, comply with the City’s applicable parking standards in Paragraph 2807.32 of the City’s



Zoning Ordinance for drive-in restaurants. (CastlePines-0107.) That is a use standard for a drive-through restaurant. Similarly, the Parkway Plaza PD outlines specific development standards, including minimum building setback and height requirements, both of which the SIP meets. (CastlePines-0107, 1458, 1462; *see also* Opening Br. at 6.)

Importantly, the Resolution does not cite to a failure of the SIP to adhere to development or use standards as a reason for denial. (CastlePines-1900.) In fact, neither the HOA nor the City Council has identified a single development or use standard to which the SIP fails to comply.

Second, the HOA misapprehends the City Council's scope of review in arguing that the because one of the Approval Standards is whether "[t]he SIP supports the goals and objectives of the [] Comprehensive Plan," and the plan mentions "land use choice" and "a community land use plan" that "can help foster a healthy balance of land uses," the City Council can properly deny the SIP based on its proposed use. This is nonsensical. Such an argument would allow the City Council to deny a site improvement plan on the basis of its proposed use even if the owner has the right to use the property for that use. *See Eason v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*, 70 P.3d 600, 605–606 (Colo. App. 2003) (recognizing

a protected property interest in a permitted use when relying on a previous zoning classification).

The HOA, though, does not stop there. It then lists in bullet form 10 alleged deficiencies with the SIP and the corresponding goal in the Comprehensive Plan to which it arguably conflicts—six of which cite to “the proposed use” and two others that are based on the proposed drive-through. (*See* HOA’s Answer Br. at 5–7.) But it does not matter whether the proposed use is compatible with those goals because CP Commercial has the right to develop the property for fast-food restaurant use.

#### **IV. The HOA and the City Council Misconstrue the Other Flaws CP Commercial Identified.**

CP Commercial explained in its Opening Brief that the City Council also overlooked the scope of its review and failed to properly consider its prior determinations in stating that the SIP did not meet certain goals in the Comprehensive Plan. CP Commercial raised these arguments to show that the City Council arbitrarily selected the “goals of walkability, high quality development and creating a sense of community” so it could assert that the SIP for a *fast-food restaurant* does not support them. Neither the HOA nor the City Council substantively counter these arguments.

**A. The Comprehensive Plan Goals Cited in the Resolution Have Questionable Applicability.**

Both the City Council and the HOA argue that CP Commercial’s point—that the first Approval Standard cannot require that the SIP meet every goal and objective of the Comprehensive Plan, some of which internally conflict—lacks merit because that standard requires the City Council to weigh the various goals and objectives. (See HOA’s Answer Br. at 9–10; City Council’s Answer Br. at 11–12.) But, in doing so, they effectively concede that the first Approval Standard does not require a site improvement plan meet 100% compliance with all goals and objectives listed in the Comprehensive Plan. (See City Council’s Answer Br. 12.) Indeed, the Resolution itself states that “[o]n balance, the SIP does not support the *applicable* goals and objectives of the . . . Comprehensive Plan.” (CastlePines-1900 (emphasis added).) Moreover, this logically means that certain goal and objects are inapplicable, and thus the City Council cannot cherry pick several goals and objectives that are directed towards other types of development or development goals.

The Resolution broadly references the “goals of walkability, high quality development, and creating a sense of community,” and specifically states:

- Economic Development Goal 2.3 - Enhance pedestrian circulation that connects commercial centers to residential neighborhoods
- Land Use Goal 2.1 - Use design techniques and land use elements to create a sense of community identity.

- Land Use Goal 2.2 Ensure non-residential building design, scale, and orientation are compatible with the surrounding natural and built environment.

(CastlePines-1900.) Most, if not all, of these goals do not apply to the SIP.

First, as described above, these goals cannot be used to deny the SIP on the basis of its proposed use.

Second, the City's prior approval of the Parkway Plaza PD further limits the applicability of the Comprehensive Plan's goals and objectives by prescribing the locations of the various lots, open space, and places for vehicular and pedestrian access in relation to the already existing roads and development. (CastlePines-1765.) The proposed SIP is restricted by its lot, which is in the middle of the planned development. Consistent with this, the proposed SIP provides walkaway access via a sidewalk. (CastlePines-1583.) Thus, while those goals were applicable to the Parkway Plaza PD's approval—and, indeed, the City determined that it complied with the Comprehensive Plan because that is one of the applicable approval criteria for a development plan, (*see* CastlePines-1721–22 (development plan approval criteria), 1763–71 (recorded plan and ordinance approving plan))—the goals have less, if any, applicability to the SIP.

As further illustration, although neither the City Council nor the HOA states how the SIP's building design, scale, and orientation is not compatible with the

surrounding environment considering that it is located with a planned commercial development, the City staff specifically found that Land Use Goal 2.2 was met because “the building would orient towards Castle Pines Parkway to create an aesthetically pleasing view.” (CastlePines-0800.) Rather, the City staff specifically identified other (applicable) goals in recommending that the City Council approve the SIP, including those concerning developing vacant commercial property. (*Id.*)

Third, neither the City Council nor the HOA address how the City Council could approve the self-storage facility on the adjacent property under the same Approval Standards yet deny the proposed SIP. A self-storage facility does not further walkability or a sense of community.

The City Council’s task was to assess the SIP under the applicable goals and objectives. It failed to do so. The only explanation for this treatment is that the City Council did not want a fast-food restaurant, and specifically, a McDonald’s.

**B. The City’s Prior Approval of the Planned Development Is Relevant.**

The City Council argues that the City’s prior approval of the Parkway Plaza PD, as well as the adjacent storage facility, lacks significance. (City Council’s Answer Br. at 12–13.) That is not so. As described above, the City’s approval of the planned development is relevant as to which goals and objectives in the Comprehensive Plan are applicable to the SIP’s review. In addition, because the City

determined that the Parkway Plaza PD complied with the Comprehensive Plan, and the City Council did not reject the SIP on the bases that it did not meet the requirements of that planned development and the technical site improvement plan requirements (*i.e.*, the second, third, and fourth Approval Standards), it begs the question how could the SIP not support the Comprehensive Plan. (*See* Opening Br. at 32–33.)

The City Council counters by arguing that it is entitled to unquestioned deference in evaluating whether an application complies with a comprehensive plan. But the case it cites—*Canyon Area Residents for the Env. v. Bd. of Cnty. Comm'rs of Jefferson Cnty.*, 172 P.3d 905, 911 (Colo. App. 2006)—addressed a rezoning application and nevertheless concluded that the board’s discretion is not absolute. To be sure, a Rule 106(a)(4) appeal concerns whether a governmental body has *abused* its discretion.

**V. The City Council and the HOA Fail to Identify Any Competent Evidence Supporting the SIP’s Denial.**

Ultimately, while both the City Council and the HOA cite to the record in support of the SIP’s denial, none of it is competent evidence. The cited “evidence” is irrelevant because it pertains to the permitted fast-food restaurant use or does not support the City Council’s stated reasons for denying the SIP; furthers the City Council’s misapplication of its code and the Approval Standards; and/or has been

shown to be false. No reweighing of evidence is required. The City Council's decision simply lacks support and thus constitutes an abuse of discretion.

### **CONCLUSION**

For the reasons stated above and in its Opening Brief, CP Commercial respectfully requests that this Court vacate and reverse the City Council's decision.

Respectfully submitted this 7th day of February, 2025.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
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Alexander P. Jack, #60682

*Attorneys for Plaintiff CP Commercial, LLC*

### **CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2025, I electronically filed a true and correct copy of the foregoing **PLAINTIFF'S REPLY BRIEF** with the Clerk via Colorado Courts E-Filing which will send notification and service upon the following:

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*Attorneys for Intervenor The Castle Pines North  
Homeowners Association No. 1*

s/ Kate M. Meade  
Kate M. Meade, Paralegal



DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED February 06, 2025 5:24 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 Alexander P. Jack, #60682 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com; ajack@bhfs.com	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>PLAINTIFF’S NOTICE OF NON-OPPOSITION TO DEFENDANT  CITY COUNCIL FOR THE CITY OF CASTLE PINES’ MOTION TO  DISREGARD INTERVENOR’S CONFLICT OF INTEREST  ARGUMENT</b></p>	

Plaintiff CP Commercial, LLC (“Plaintiff”), through undersigned counsel, hereby notifies the Court that Plaintiff does not oppose Defendant City Council for the City of Castle Pines’ Motion to Disregard Intervenor’s Conflict of Interest Argument (“Motion”) in its Answer Brief.

1. Intervenor The Castle Pines North Homeowners Association, No. 1 (“Intervenor”) filed its Answer Brief on January 24, 2025, in which it raised arguments of conflict of interest, bias, and lack of due process.

2. On February 6, 2025, Defendant City Council for the City of Castle Pines (“Defendant”) filed its Motion to Disregard Intervenor’s Conflict of Interest Argument which the Intervenor raised in its Answer Brief.

3. Plaintiff and Defendant attempted to confer on the Motion but were unable to do so prior to Defendant’s filing of the Motion.

4. Plaintiff agrees with Defendant’s Motion and hereby joins in the relief requested therein.

Respectfully submitted this 6th day of February, 2025.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
J. Maxwell Porteus, #56405  
Alexander P. Jack, #60682

*Attorneys for Plaintiff CP Commercial, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of February, 2025, I electronically filed a true and correct copy of the foregoing **PLAINTIFF'S NOTICE OF NON-OPPOSITION TO DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE PINES' MOTION TO DISREGARD INTERVENOR'S CONFLICT OF INTEREST ARGUMENT** with the Clerk via Colorado Courts E-Filing which will send notification and service upon the following:

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Homeowners Association No. 1*

s/ Kate M. Meade  
Kate M. Meade, Paralegal

32628440

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED February 06, 2025 11:49 AM
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
Josh A. Marks, Atty. Reg. # 16953 Geoffrey C. Klingsporn, Atty. Reg. # 38997 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com geoff.klingsporn@bhgrlaw.com	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<p style="text-align: center;"><b>DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE PINES' MOTION  TO DISREGARD INTERVENOR'S CONFLICT OF INTEREST ARGUMENT</b></p>	

Defendant, City Council for the City of Castle Pines, Colorado, through respectfully submits its Motion to Disregard Intervenor's Conflict of Interest Argument (the "Motion"), and states as follows<sup>1</sup>:

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<sup>1</sup> **Certificate of Conferral.** As required by C.R.C.P. 121, §1-15, ¶8, undersigned counsel conferred with counsel prior to filing this Motion to Disregard Intervenor's Conflict of Interest Argument. Undersigned counsel is authorized to state that the Intervenor opposes the requested extension. Plaintiff has not responded to the conferral.

1. This matter seeks judicial review pursuant to C.R.C.P. 106(a)(4) of the City's denial of Plaintiff's Site Improvement Plan ("SIP") application following a public hearing. Plaintiff initiated this matter and filed an Opening Brief.

2. The Castle Pines North Homeowners Association No. 1, ("HOA") sought and was granted leave to participate as an intervenor. However, in response to the HOA's Motion to Intervene, the City raised concerns that the HOA would attempt to raise new issues and arguments. Addressing that concern, the Court noted in its December 17, 2024 Order granting Intervention:

This motion being granted does not change the nature of the limited purpose of this action as an appeal of the City's actions under Rule 106(4) [sic] and the Court will not allow Intervenor to cloud the issues or expand the very limited purpose of this case.

3. In contravention of that guidance, the Intervenor's Response Brief raises conflict of interest, bias and lack of due process contentions that have been raised for the first time in this matter. (See Castle Pines Homeowners Association, No.1's Answer Brief at pgs. 12-14). Plaintiff's Opening Brief defines the scope of the issues for the Court to consider as alleged abuses of discretion that challenge the City's SIP denial, yet Plaintiff did not assert any conflict-of-interest arguments. Nor did the City's Answer Brief. The HOA's assertion of the conflict argument injects a completely new argument into this judicial review matter (with a related attempt to have this Court consider documents outside of the certified record that were not before the City Council in Exhibits A and B to the HOA's Brief).

4. This Court has the inherent power to undertake all reasonable actions to allow the court to efficiently perform its judicial functions and to make its lawful actions effective. *Laleh v. Johnson*, 405 P.3d 286, 292 (Colo.App. 2016). Rather than asking the Court to allow the City

to submit a Supplemental Brief addressing this newly raised contention on the merits, the more appropriate remedy is to have the Court disregard the Intervenor's argument as violative of its prior guidance and inappropriate for a judicial review claim where the Plaintiff has not raised the argument. Accordingly, the City requests that the Court order what it previously suggested—that it will not consider the Intervenor's newly raised conflict of interest argument.

5. A draft order proposing that remedy is filed contemporaneously with this Motion.

WHEREFORE, Defendant, City Council for the City of Castle Pines, Colorado, requests that the Court disregard the Intervenor's conflict of interest argument.

Respectfully submitted this 6th day of February 2025.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file at  
Berg Hill Greenleaf Ruscitti LLP]*

*s/ Josh A. Marks*

---

Josh A. Marks  
Geoffrey C. Klingsporn

*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of February, 2025, a true and correct copy of the foregoing **DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE PINES' MOTION TO DISREGARD INTERVENOR'S CONFLICT OF INTEREST ARGUMENT** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
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Jonah G. Hunt  
Marcus T. Wile  
Orten Cavanagh Holmes & Hunt, LLC  
1445 Market Street, Suite 350  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

---

Cheryl Stasiak

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	<div> DATE FILED  February 06, 2025 11:49 AM </div> <div> ▲ COURT USE ONLY ▲ </div>
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	
Case Number: 2024CV30582  Div.: 6      Ctrm.:	
<p style="text-align: center;"><b>ORDER GRANTING DEFENDANT CITY COUNCIL FOR THE CITY OF  CASTLE PINES' MOTION TO DISREGARD INTERVENOR'S CONFLICT  OF INTEREST ARGUMENT</b></p>	

This matter comes before the Court on Defendant City Council for the City of Castle Pines’ Motion to Disregard Intervenor’s Conflict of Interest Argument (the “**Motion**”). The Court, having reviewed the Motion, any related leadings or filings, and being fully advised in the matter, enters the following order:

The Motion is HEREBY GRANTED. The Court will disregard the Intervenor’s conflict of interest argument as it rules on the Plaintiff’s C.R.C.P. 106(a)(4) claim.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2025.

BY THE COURT:

\_\_\_\_\_  
ROBERT R. LUNG  
District Court Judge



DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED January 24, 2025 3:36 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO, and  <b>Intervenor:</b> CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1	<div style="border-top: 1px solid black; padding-top: 5px;"> <b>▲ COURT USE ONLY ▲</b>  Case No.: 2024CV30582   Div.: </div>
<i>Attorneys for Intervenor Castle Pines North  Homeowners Association, No. 1:</i> ORTEN CAVANAGH HOLMES & HUNT, LLC Jonah G. Hunt, No. 34379 Marcus T. Wile, No. 49471 Address:       1445 Market Street, Suite 350 Denver, CO 80202 Phone Number:   (720) 221-9780 Fax Number:       (720) 221-9781 Email: <u><a href="mailto:jhunt@ochhoalaw.com">jhunt@ochhoalaw.com</a></u> <u><a href="mailto:mwile@ochhoalaw.com">mwile@ochhoalaw.com</a></u>	
<p style="text-align: center;"><b>THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1’S  ANSWER BRIEF</b></p>	

Intervenor The Castle Pines North Homeowners Association, No. 1

(“Association”), by and through counsel, submits its Answer Brief as follows:

## **CERTIFICATE OF COMPLIANCE**

The undersigned attorney for the Association hereby certifies that the Answer Brief complies with the requirements of C.A.R. 28 and 32.

Specifically, the undersigned certifies that the brief complies with the formatting requirements set forth in C.A.R. 28(a), and the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,140 words (principal brief does not exceed 9,500 words).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28. In addition, the Answer Brief complies with the requirements of C.A.R. 32(a)(1).

Dated this 24<sup>th</sup> day of January, 2025.

ORTEN CAVANAGH & HOLMES, LLC

By: /s/ Jonah Hunt  
Jonah G. Hunt, No. 34379

*Attorneys for Intervenor Castle Pines North  
Homeowners Association, No. 1*

## TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
II. STANDARD OF REVIEW .....	2
III. ARGUMENT .....	3
A. CITY COUNCIL DID NOT ABUSE ITS DISCRETION IN DENYING THE SIP .....	3
B. PUBLIC CITIZENS WERE ENTITLED TO COMMENT ON THE SIP.....	7
C. CITY COUNCIL NOT OBLIGATED TO FOLLOW RECOMMENDATIONS OF STAFF .....	8
D. CITY COUNCIL DID NOT REQUIRE THAT EVERY GOAL AND OBJECTIVE OF THE COMPREHENSIVE PLAN BE MET .....	9
E. CITY COUNCIL CORRECTLY ANALYZED TRAFFIC CONCERNS AND CONSIDERATIONS .....	10
F. CITY COUNCIL’S DETERMINATION WAS CORRECT IN SPITE OF CONFLICTS OF INTEREST.....	12
IV. CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Cases

<i>Abromeit v. Denver Career Serv. Bd.</i> , 140 P.3d 44, 53 (Colo. App. 2005) .....	3
<i>Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs of Jefferson Cnty.</i> , 172 P.3d 905, 907 (Colo. App. 2006) .....	2
<i>Canyon Area Residents</i> , 172 P.3d at 907 .....	3
<i>City of Manassa v. Ruff</i> , 235 P.3d 1051, 1057 (Colo. 2010) .....	12
<i>IBC Denver II, LLC v. City of Wheat Ridge</i> , 183 P.3d 714, 717 (Colo. App. 2008) ..	2
<i>In re Interest of D.R.V.</i> , 885 P.2d 351, 355 (Colo. App. 1994) .....	3
<i>MDC Holdings, Inc. v. Town of Parker</i> , 223 P.3d 710, 717 (Colo. 2010) .....	3
<i>Public Serv. Co. v. Van Wyk</i> , 27 P.3d 377, 391 (Colo. 2001) .....	7
<i>Ross v. Fire &amp; Police Pension Ass'n</i> , 713 P.2d 1304, 1309 (Colo. 1986) .....	2
<i>Scott v. City of Englewood</i> , 672 P.2d 225, 227 (Colo. App. 1983) .....	12
<i>Walter G. Burkey Tr. v. City &amp; Cty. of Denver</i> , 2012 COA 20, ¶ 8, 284 P.3d 158...3	

### Statutes

C.R.S. § 25-12-104 .....	7
C.R.S. § 31-23-206(1) .....	4

### Rules

C.R.C.P. 106(a)(4) .....	2
C.R.C.P. 106(a)(4)(I) .....	2

### Other Authorities

Colorado Consitution Article XX .....	8
City's Zoning Ordinance § 2703.01(b) .....	2

<a href="https://www.castlepinesco.gov/city-services/about-castle-pines/guiding-documents/">https://www.castlepinesco.gov/city-services/about-castle-pines/guiding-documents/</a> .....	2, 8, 13
City’s Zoning Section 2703.01(a) .....	5
City’s Zoning Section 2703.01(e) .....	5
City’s Zoning Section 2703.02(b) .....	3

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

CP Commercial, LLC's ("CP") proposed site improvement plan ("SIP") was denied first by the Planning Commission and then by the City Council of Castle Pines, Colorado ("City Council"). Competent evidence supported the findings that the SIP did not comply with the applicable Approval Standards set forth in Section 2703.01 of the City's Zoning Ordinance and was also incompatible with various goals and objectives in the Comprehensive Plan. In doing so, City Council did not exceed its jurisdiction, abuse its discretion, or act arbitrarily or capriciously.

In its prolix<sup>1</sup> opening brief, CP principally argues that if zoning of the property permits a fast-food establishment as a principal use, any denial of the SIP based on incompatibility with related use standards and site plan criteria would be pretextual, arbitrary, or capricious, *e.g.* "The Castle Pines North HOA 1 submitted a vigorous opposition primarily based on concerns about the proposed *use*, and not whether the SIP met the Approval Standards." *P's Op. Br.*, p. 11.

This argument is untenable given that "use" related considerations are in fact part of the site plan approval standards which the City Council relied on in denying

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<sup>1</sup> For purposes of the record and private and judicial economy, the Association denies any allegation of CP not specifically addressed herein.

the SIP. *See* City's Zoning Ordinance<sup>2</sup> § 2703.01(b) (criteria includes whether the SIP is consistent with the *use* standards within the City's Zoning Ordinance).

## **II. STANDARD OF REVIEW**

In a C.R.C.P. 106(a)(4) action, "[r]eview shall be limited to a determination of whether the body or officer of any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body...." C.R.C.P. 106(a)(4)(I). A governmental body abuses its discretion when its decision is not supported by any competent evidence in the record. *Id.* "No competent evidence" means that the decision of the governing body was "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, 1309 (Colo. 1986) (citation omitted).

A district court has no fact-finding authority in such cases. *Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs of Jefferson Cnty.*, 172 P.3d 905, 907 (Colo. App. 2006). The review is based solely on the record that was before the governmental body. *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008). The decision of the governmental body is presumed to be correct, and it is the appellant's duty to provide a complete record from which the

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<sup>2</sup> <https://www.castlepinesco.gov/city-services/about-castle-pines/guiding-documents/>

reviewing court can determine whether error occurred. *In re Interest of D.R.V.*, 885 P.2d 351, 355 (Colo. App. 1994); *see also Abromeit v. Denver Career Serv. Bd.*, 140 P.3d 44, 53 (Colo. App. 2005) (a district court may not consider matters not contained in the record nor consider arguments and issues not raised below).

A district court may consider whether the governing body misconstrued or misapplied the law. *See Canyon Area Residents*, 172 P.3d at 907. Interpretation of a municipal ordinance involves a question of law subject to *de novo* review. *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010). The same rules of construction apply in interpreting ordinances as in construing statutes. *Walter G. Burkey Tr. v. City & Cty. of Denver*, 2012 COA 20, ¶ 8, 284 P.3d 158. District courts look to the plain language of the ordinance in order to give it effect. *Id.*

### **III. ARGUMENT**

#### **A. CITY COUNCIL DID NOT ABUSE ITS DISCRETION IN DENYING THE SIP**

CP argues that the City has no basis to deny a SIP based on proposed use. *Op. Br.*, p. 30 (“City Council cannot deny a SIP for reasons inherent to the proposed use because that it outside the scope of the council’s review.”) However, this argument is contradicted by the plain language of Section 2703.02(b), which approval criteria includes whether the SIP is consistent with the use standards set forth in the City’s Zoning Ordinance.



Next, without citation to authority, CP makes the sweeping statement that “the “applicable goals and objectives” of the Comprehensive Plan cannot include those pertaining to the proposed use.” *Op. Br.*, p. 26. However, the Comprehensive Plan provides that:

- Communities are increasingly aware of these realities and are responding by considering land use choices that support healthy lifestyles—and meet the community’s expectations for parks, open space, and recreation facilities, services, and schools.
- A community land use plan that is programmed in a deliberate manner, with an understanding of market, financial, and physical realities, can help foster a healthy balance of land uses, and increase predictability for its officials, staff, citizens, and other interested parties.

Comprehensive Plan, p. 4 & 16.

Moreover, in 2007, the Colorado General Assembly adopted the Predictability in Planning Act, which revised C.R.S. § 31-23-206(1) to specifically state that “(t)he master plan of a municipality is an advisory document to guide land development decisions; however, the plan or any part thereof may be made binding by inclusion in the municipality’s adopted subdivision, zoning, platting, planned unit development, or other similar land development regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes as appropriate.”

As a home rule municipality, the City has opted to include Comprehensive Plan compliance in its SIP Approval Standards explicitly through Section 2703.01(a), and implicitly, through Section 2703.01(e), which is the requirement of furthering public health, safety, and welfare of the community. CF, p. # 681. These approval standards establish a burden of proof for CP and any other applicant, which clearly have not been met in this case.

In correspondence dated October 13, 2023, March 20, 2024, and May 21, 2024, the Association identified over twenty (20) deficiencies of the SIP in meeting the goals and objectives of the Comprehensive Plan and/or which failed to support the public health, safety and welfare of the community. CF, pp. # 578-589 and 681-684. By way of illustration, rather than limitation, below are a sampling of the negative impacts, nuisances, and risks associated with the SIP which relate to traffic, noise, lighting, air pollution, trash, and/or public safety:

- The proposed double drive-through is designed, per the applicant's admission, to drive substantial traffic from I-25 resulting in 75% of the business being drive through. *See* Comprehensive Plan Section ED-2.2.
- The proposed double drive-through will create barriers to safe pedestrian connectivity from the Association's neighborhood, to and from American Academy, and to and from the Montessori School. *See* Comprehensive Plan Section ED-2.3.

- The proposed use will degrade bicycle and pedestrian traffic in the area of two schools and a park especially around peak times. *See* Comprehensive Plan Section T-2.3.
- Because of the challenging ingress and egress pattern to the proposed facility, connectivity, accessibility, safety and comfort of pedestrian and bicycling uses will be degraded and not improved. *See* Comprehensive Plan Section T-3.
- Given the restricted ingress and egress to the location, the proposed use will result in a substantially negative impact on existing traffic patterns and emergency services from South Metro Fire & Rescue. *See* Comprehensive Plan Section LU-8.1.
- The proposed use degrades multi-modal, especially bicycles and pedestrians, because of the impacts on Castle Pines Parkway and Lagae Road with the challenging ingress and egress and plans to drive additional traffic volumes to and through Castle Pines Parkway and Lagae Road. *See* Comprehensive Plan Section T-5.
- The proposed use does not maintain the single-family housing character with the location of an intense drive-thru use within 500 feet of existing single-family housing. Instead, it substantially impairs the single-family character due to increased traffic, noise, air and light pollution, litter, and public safety issues. *See* Comprehensive Plan Section H-1.2.
- The applicant has failed to show that it will minimize negative impacts of light and noise pollution from vehicles in the drive through and minimize impacts of light and noise pollution. *See* Comprehensive Plan Section LU-5.1.
- The proposed use depends on a business model with convenience packaging. The business will thus substantially increase waste due to its fast-food model and increase in carcinogens due to PFAS in its packaging. *See* Comprehensive Plan Section LU-5.8.

- The proposed use privileges an international franchising entity over small business with imported workforce rather than having jobs for locals. *See* Comprehensive Plan Section ED-1.3

In addition to the noncompliance with Approval Standards and the Comprehensive Plan, the above would also give rise to statutory and common law claims of nuisance. *See* C.R.S. § 25-12-104; *and Public Serv. Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001) (elements of a nuisance claim include an intentional, negligent, or unreasonably dangerous activity causing unreasonable and substantial interference with another’s use and enjoyment of their property).

**B. PUBLIC CITIZENS WERE ENTITLED TO COMMENT ON THE SIP**

CP argues that because the vast majority of the comments received by the Planning Commission were vigorously opposed to the SIP, that the City Council “succumbed to public pressure” as opposed to evaluating whether the SIP met the Approval Standards. *Op. Br.*, p. 11. However, there is nothing in the record to support the claim that City Council disregarded the Approval Standards in favor of the public comments it received. Moreover, many of the public comments referenced specific Approval Standards in opposing the SIP. CF, pp. # 416-417, 428-429, 576-577.

Section 3.6 of the City’s Home Rule Charter (“Charter”)<sup>3</sup> requires a reasonable opportunity to be heard in public comment. A “reasonable opportunity” to be heard must include the ability of a person to address concerns regarding their rights provided under the Charter or other statutory or constitutional provisions. *R.*, 680. City Council did not err in permitting public comment.

If anything, the City improperly limited public comment. CF, p. # 683. Section II(h)(2) of the City Council Procedures and Rules of Order dated March 26, 2024, improperly limits and excludes public comment of a citizen. Limiting comment ostensibly for purposes of meeting efficiency violates Section 3.6 of the Charter.

**C. CITY COUNCIL NOT OBLIGATED TO FOLLOW RECOMMENDATIONS OF STAFF**

CP repeatedly implies that City Council acted arbitrarily or capriciously in not following the recommendations of staff in denying the SIP. *Op. Br.*, pp. 11-12, 22, 27-28, 31, 36-37, 40-41. This is deceptive and inaccurate.

The City is a home rule municipality with all powers granted by Article XX of the Colorado Constitution and the Charter. The Charter provides that City Council shall exercise all “powers and functions of municipal government” and “shall have the power and authority to adopt such ordinances, resolutions and

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<sup>3</sup> <https://www.castlepinesco.gov/city-services/about-castle-pines/guiding-documents/>

motions, as it shall deem proper.” Charter, Section 2.10. In contrast, City staff work and operate “subject to the oversight and control of the City’s elected leaders.” Charter, p. 5. There is no credible argument to be made that a staff recommendation may not be disregarded by the City Council.

**D. CITY COUNCIL DID NOT REQUIRE THAT EVERY GOAL AND OBJECTIVE OF THE COMPREHENSIVE PLAN BE MET**

CP argues, without support in the record, that City Council required that every goal and objective in the Comprehensive Plan be met, e.g. “that the SIP comply with every conceivable aspect of every single development goal.” *Op. Br.*, p. 30-31. This is a false narrative. CP cites to page 2 of Resolution No. 24-39, CF, p. #1900, in support of this statement.

However, the Resolution, on its face, neither requires nor alleges that every goal and objective in the Comprehensive Plan be met, *e.g.*:

- On balance, the SIP does not support the applicable goals and objectives of the City of Castle Pines Comprehensive Plan (Section 2703.01(a)).
- As evidenced by the public testimony, the nature of the drive-through use, and the lack of outdoor eating spaces, the application does not meet these overall goals including, more specifically:
  - Economic Development Goal 2.3 - Enhance pedestrian circulation that connects commercial centers to residential neighborhoods.
  - Land Use Goal 2.1 - Use design techniques and land use elements to create a sense of community identity.

- Land Use Goal 2.2 - Ensure non-residential building design, scale, and orientation are compatible with the surrounding natural and built environment.

The plain language of the Resolution reflects that City Council did not require strict adherence to every goal or objective. CF, p. # 1900. Rather, it specified numerous, legitimate concerns which are well within the purview of the Comprehensive Plan and Approval Standards. The City Council's determination was well reasoned and developed, rather than arbitrary or capricious.

**E. CITY COUNCIL CORRECTLY ANALYZED TRAFFIC CONCERNS AND CONSIDERATIONS**

None of the traffic studies in the record reflected CP's true intentions with respect to the proposed use. CF, p. # 254, 945. For instance, the fact that 75% of the revenue was to be derived from drive-through as opposed to dine-in customers was not voluntarily disclosed. CP was only forced to admit the same in response to direct questioning from a Planning Commissioner. CF, p. # 684. CP did not address the issue of vehicular noise caused by a drive-through. Rather, it sidestepped the concern by talking about theoretical decibel levels of speakers without providing an actual range of operation. CF, p. # 685.

Resolution 24-39 addressed the traffic deficiencies directly, e.g.:

- The traffic study is flawed in that it relies on 2011 data and doesn't consider traffic from door dash and other food delivery services.
- While the traffic study relies on traffic engineering models, there should be additional consideration or rationale of the model in relation to actual driving patterns. As one Councilmember noted, the traffic study does not take into account that drivers will not travel all the way to the roundabout but will make a U-turn on Lagae Road in conflict with the shopping center across the street.
- Although the traffic study considers the road network, it doesn't consider the school uses surrounding the site which are relevant to traffic concerns and public safety.
- The traffic study also does not account for delivery trucks, fire trucks and their ability to access the site.
- The traffic study does not account for employee parking.

The traffic studies were artificially narrow in scope, omitting such additional and significant concerns as:

- The lack of a queuing analysis during peak hours, *e.g.* “was there a queuing analysis done during the peak hour of the Montessori and the, um, American Academy school in the traffic study? The answer is no.” CF, p. # 1571.
- Large semi-trailer trucks delivering supplies and raw materials creating traffic issues and operating during evenings and otherwise quiet times in a residential area. CF, p. # 579.
- Commercial trash collection occurring in quiet hours and creating additional traffic and noise to surrounding areas, impacting the quiet enjoyment of neighboring homeowners. CF, p. # 579.



CP argues that none of the above are relevant when evaluating a SIP so long as technical standards and requirements including the City of Castle Pines Roadway Design & Construction Standards Manual are superficially addressed, e.g. inclusion of trip generation rates, etc. *Op. Br.*, p. 36. CP argues that exacerbation of an already existing traffic problem is not a relevant consideration for City Council. *Op. Br.*, p. 38. The arguments are not credible and fall short of evincing any abuse of discretion of City Council.

**F. CITY COUNCIL’S DETERMINATION WAS CORRECT IN SPITE OF CONFLICTS OF INTEREST.**

Quasi-judicial proceedings must be conducted in accordance with due process. *Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983). Fundamental to due process is a neutral and detached decision maker. *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010). The Association and its residents are entitled to due process and neutrality in connection with City land use proceedings.

CP is in the unenviable position having to prove that City Council’s abused its discretion or acted arbitrarily in denying the SIP despite having irreconcilable conflicts of interest with CP, LG Partners, LLC, Ventana Capital and its affiliates

which impacted the City's objectivity and the Association's right to due process.

CF, p. # 679.

Specifically, the City agreed to confidentially split profits with CP and assured it of a favorable review process. On March 19, 2019, the City Manager emailed a letter to Ventana Capital, an affiliate of CP, affirming that "SIPs are approved by Planning Commission with little discretion... (and) the uses discussed are not subject to a public hearing and are strongly supported by Staff." *See Exhibit A.* On August 5, 2020, a Public-Private Partnership Agreement ("PPPA") was entered into between CP's affiliate, LS Partners, LLC, and the City. The PPPA and City Resolution No. 20-07 approving the same are attached hereto as **Exhibit B**.

Section 5 provides that LS Partners and the City are to share equally in land sale proceeds under the Agreement. In Section 8, the City assumed the responsibility to make intersection improvements, in derogation of Section 1002 of the City's Subdivision Regulations<sup>4</sup>, e.g. "(t)he developer shall provide for the construction, at no cost to the City or school district or public, all roads adjacent to publicly dedicated sites, traffic signalization to serve the site, extension of all utilities to the site, and other public infrastructure as required by the City Council".

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<sup>4</sup> <https://www.castlepinesco.gov/city-services/about-castle-pines/guiding-documents/>. There is nothing in the record indicating that CP satisfied the land dedication requirement.

Section 10 of the PPPA aims for confidentiality, giving rise to legitimate concerns about the deprivation of an open and fair hearing by the City. Designating documents as “confidential” is contrary to the spirit of the Colorado Open Records Act and the City’s ostensible commitment to operating transparently.

In addition, the Planning Commission Chair did not disclose a conflict of interest from having worked with the developer while on City Council. The Chair openly advocated for the applicant rather than impartially assessing the evidence put forth. CF, p. # 680. The City Council proceeding was tainted by this undisclosed conflict of interest.

Due to the PPPA and the City’s bartering activities with CP and its affiliates, the City Council’s ability to provide independent and objective third-party review of the SIP was compromised. Despite the City’s conflicts, preference and bias in favor of CP, the City Council ultimately was forced to deny the SIP due to the same’s indisputable noncompliance with the Approval Standards and Comprehensive Plan. CP wrongfully assumed that the City would rubber stamp its SIP given the parties’ interrelated dealings, but fortunately, that did not occur.

#### IV. CONCLUSION

Wherefore, for the reasons articulated above, the Association requests that this Court denial CP's appeal and affirm the findings and determinations of the City Council.

Respectfully submitted this 24<sup>th</sup> day of January, 2025.

ORTEN CAVANAGH HOLMES & HUNT, LLC

*Original signature on file.*

By: /s/ Jonah Hunt

Jonah G. Hunt, No. 34379

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*Attorneys for The Castle Pines North Homeowners  
Association, No. 1*

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 24, 2025, a true and correct copy of the foregoing **THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S ANSWER BRIEF** was served via LexisNexis/CCEF/U.S. Mail/Email upon the following:

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City Council. The Council also disapproved the application. Plaintiff now argues that because the parcel was zoned for fast-food restaurants and “permitted uses are allowed by right,” the Council was required to approve its McDonald’s. On the contrary, the Council acted lawfully and well within its discretion. Its decision was both reasonable and supported by competent evidence. This Court should reject Plaintiff’s invitation to reweigh the administrative record, and instead affirm the Council’s decision.

## **II. FACTUAL BACKGROUND**

Plaintiff CP Commercial (“CP”) is the owner of an approximately 1.3-acre parcel of real property also known as Lot 3 of the Lagae Family Trust Minor Development. The Property is located within an undeveloped area known as the Parkway Plaza Planned Development (“Parkway Plaza PD”). However, the Property sits at the intersection of two busy thoroughfares, located near two schools; the Planned Development is surrounded by existing residential development.

Seeking to construct and operate a drive-through McDonalds restaurant on the Property, CP submitted an application for a Site Improvement Plan as required by the City’s zoning ordinance. On March 28, 2024, the City’s Planning Commission voted 5-2 to deny the application. CP subsequently filed a written notice of appeal, seeking a public hearing before the City Council.

During its meeting on May 28, 2024, the Council heard presentations from planning and engineering staff, including its traffic engineer; and representatives from CP, including its counsel, site designer, traffic engineer, and the franchisee and operator. (*See generally*, Council

Hearing Transcript, at CastlePines-1498-1605.)<sup>1</sup> Staff recommended that the Council approve the application, subject to some conditions. (*Id.* at 1510-11; Council Packet, at CastlePines-0110.)

After lengthy questioning of both staff and CP representatives, the Council heard extensive public comment. (*See generally*, CastlePines-1485-1704.) CP's counsel was then allowed time to rebut public comments. (CastlePines-1665-72.)

The Council briefly entered executive session for legal advice regarding whether approval could be conditioned on a limitation to the restaurant's operating hours. (CastlePines-1673-74.) After motions and further discussion, the Council rejected the application by a vote of 5-2. (CastlePines-1676-1702.)

The Council adopted Resolution No. 24-39, finding that "[o]n balance, the SIP does not support the applicable goals and objectives of the City of Castle Pines Comprehensive Plan." (CastlePines 1899-1901.) Specifically, "the application does not meet" the Comprehensive Plan's goals of enhancing pedestrian circulation connecting commercial centers to residential neighborhoods; creating a sense of community identity; and ensuring compatibility with the surrounding environment. (CastlePines 1900.) The Council also found that "[t]he SIP does not further public health, safety, and welfare" due to flaws and omissions in its traffic study. (CastlePines-1901.)

CP now appeals the Council's decision.

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<sup>1</sup> **Note on citations:** To conform with Plaintiff's usage in its opening brief, citations to the Administrative Record take the form of "CastlePines-[pages]."



### III. ARGUMENT

#### A. This Court's Review is Limited and Deferential

Since its adoption in 1941, “the nature of review under Rule 106(a)(4) has remained consistently narrow: Courts simply review the lower body or officer’s decision to determine whether it ‘has exceeded its jurisdiction or abused its discretion’ when ‘there is no plain, speedy and adequate remedy otherwise provided by law.’” *Brown v. Walker Com., Inc.*, 2022 CO 57, ¶ 27 (quoting C.R.C.P. 106(a)(4) (2022)) (surveying the rule’s history).<sup>2</sup> “An action by an administrative body is not arbitrary or an abuse of discretion when the reasonableness of the body’s action is open to a fair difference of opinion, or when there is room for more than one opinion.” *No Laporte Gravel Corp. v. Bd. of Cnty. Comm’rs of Larimer Cnty.*, 2022 COA 6M, ¶ 25 (quoting *Khelik v. City & Cnty. of Denver*, 2016 COA 55, ¶ 13 (alterations omitted)).

This review is by its nature highly deferential. A decision by the City Council will be upheld if there is any competent evidence in the record to support it. *Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 2018 COA 65, ¶ 27 (“Our task is not to evaluate the thoroughness of the City Council’s subsidiary findings; our task is to examine the record to ensure that some evidence exists to support the City Council’s ultimate decision.”) (citing *Sundance Hills Homeowners Ass’n v. Bd. of Cty. Comm’rs for Arapahoe County*, 534 P.2d 1212, 1216 (Colo. 1975)). This is so even if the decision is arguably questionable or even mistaken: “[t]he role of a reviewing court in a challenge to a zoning board’s decision is not and should not be to sit as a

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<sup>2</sup> CP does not argue that the City Council exceeded its jurisdiction, only that it “abused its discretion and exercised its authority arbitrarily and capriciously” in denying the SIP here. (Op. br. at 44; *see id.* at 1 (“The City Council abused its discretion.”).)

zoning board of appeals.” *Bd. of Cnty. Comm’rs of Routt Cnty. v. O’Dell*, 920 P.2d 48, 50 (Colo. 1996) (internal citations and quotations omitted).

The Council’s interpretation of the law is also entitled to deference. “If there is a reasonable basis for an administrative board’s interpretation of the law, we may not set aside the decision on that ground.” *City & Cnty. of Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo. App. 2002) (citing *Wilkinson v. Bd. of Cnty. Comm’rs*, 872 P.2d 1269 (Colo. App. 1993)). Such deference extends to code construction, such as land use codes: “a reviewing court should defer to the construction of a statute by the administrative officials charged with its enforcement.” *Id.* (citing *Platte River Env’t Conservation Org., Inc. v. National Hog Farms, Inc.*, 804 P.2d 290 (Colo. App. 1990)); *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 8 (“While interpretation of a city code is reviewed de novo, interpretations of the code by the governmental entity charged with administering it deserve deference if they are consistent with the drafters’ overall intent.”).

Especially viewed under this deferential standard, the Council’s decision here was correct and should be affirmed. The City Council neither misapplied the law nor abused its discretion, and its decision to disapprove the proposed SIP was supported by the evidence before it.

**B. The Council’s Decision to Deny the SIP Application Was Reasonable and Supported by Competent Evidence**

The essential question for the Court is whether “some evidence exists to support” the City Council’s findings in its Resolution denying CP’s application. *Stor-N-Lock Partners*, 2018 COA 65, ¶ 27. The Council’s decision was supported by competent evidence.

CP’s opening brief misstates the applicable standard, suggesting the Court should consider the competing evidence presented to the Council and reverse if it finds “a reasonable

mind would not accept the evidence in the record as adequate to support the council's decision." (Op. br. at 44.) That is incorrect. Instead, a reviewing court must "affirm the administrative body's decision unless ... no competent evidence supports its decision." *Johnson v. Dep't of Safety*, 2021 COA 135, ¶ 16 (quoting *Whitelaw*, 2017 COA 47, ¶ 8). And "no competent evidence" means that the decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008). In short, the Court must decline CP's invitation to reweigh the evidence, and determine only whether the decision has record support.

Each item in the Resolution is supported by evidence in the record. The Resolution itself is the starting point. It finds that CP's application did not satisfy "the Comprehensive Plan's goals of walkability, high quality development and creating a sense of community," and explicitly declares that this finding is "evidenced by the public testimony, the nature of the drive-through use, and the lack of outdoor eating spaces." (CastlePines-1900 (emphasis added).) CP cannot, and does not, dispute the drive-through emphasis of the restaurant or the absence of an outdoor eating space. Indeed, at the hearing CP's counsel represented that "75 percent of the business is estimated to come from the drive-thru" (CastlePines-1586), and conceded that the applicant consciously chose to remove from the restaurant any "outdoor area ... for pedestrian kind of congregation." (CastlePines-1583-84.)

Further, as noted in the resolution, public testimony provided support for the Council's conclusions regarding the effects of the proposed restaurant. Castle Pines residents testified at the hearing that "Someone is going to get killed" crossing Castle Pines Parkway (CastlePines-1613;

*see also* CastlePines-1614 (same); CastlePines-1616-17 (predicting “tragic accidents for children walking or biking to school... It does not present a walkable, bikeable community vibe”; CastlePines-1645 (“definitely a safety risk for pedestrians ... definitely a risk for people on bikes”); CastlePines-1659 (“Kids will be crossing at Lagae. They will get hit.”).) Others contested staff’s conclusions regarding walkability and community-building by pointing to McDonald’s corporate strategic initiatives emphasizing “digital, delivery, and drive-thru” rather than walk-in and sit-down dining. (CastlePines-1626-27; *see also* CastlePines-1636 (“Seventy-five percent of this business’s gross revenue is going to be from drive-thru traffic. That doesn’t make our community walkable.”); CastlePines-1639 (“It will not encourage a walkable, bikeable community, nor a pedestrian friendly neighborhood.”); CastlePines-1652 (McDonald’s development “really contradicted” a commitment to walkability and community).)

The written testimony submitted to City Council likewise urged, “whatever goes in there should be a *community-builder*... You want a local business where you can see and spend time with a neighbor... Fast food establishments can do that, but there are so many other aspects about a McDonald’s that take away from the desire to stay and chat with a friend.” (CastlePines-1482; *see also* CastlePines-1107 (suggesting “a better idea for providing a gathering space for the community of Castle Pines”); CastlePines-1144 (“I implore you to oppose this application and any similar uses that do not bring value and a sense of community to our town.”).)

Written comments also echoed the in-person testimony noting the tension between a drive-through business model and the Comprehensive Plan’s goals of walkability and community given McDonald’s corporate “strategy of ‘Accelerating the Arches 2.0.’” (CastlePines-1273; *see also* CastlePines-1325, 1327-28 (detailing “areas I believe that

McDonald's at this location does NOT meet our City's Comprehensive Plan"); CastlePines-1375-78 (same); CastlePines-1110 ("The path behind our homes is heavily utilized currently and we believe that will not continue... It will change that experience for all walkers and bikers."); CastlePines 1170-71 ("a 24 hour fast food restaurant does not add to the enjoyment of those who use the park, trails, and sidewalks around the location for playing, walking and biking"); CastlePines-1385 ("I stopped riding my bicycle on each of those thoroughfares... I have altered my walking routes and times to avoid [them.]").)

In short, the findings in the Resolution are supported by the competent evidence specifically cited in the Resolution.

CP does not deny the existence of this evidence. Instead, it asks the Court to consider other evidence "[t]o the contrary." (Op. br. at 40-41.) CP points to "evidence in the record ... that the SIP includes quality design, materials, and landscaping" and that "[e]ven though the McDonald's would provide the convenience of a drive-thru, the SIP allows for pedestrians to access the Property via a sidewalk." (*Id.*) Notably, "quality design" and sidewalk access do not equate with or establish "walkability... and creating a sense of community." But even if they could, this argument misapprehends the nature of judicial review, which does not permit the reweighing of evidence.

The Council considered CP's evidence, including staff recommendations, and concluded that it was outweighed by other evidence. CP maintains that the Council's findings were incorrect; but even if the Court agreed, that would be insufficient to overturn the denial of the application. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008) ("We are not

the fact finder and, thus, cannot weigh the evidence or substitute our own judgment for that of the Town.”).

The Resolution is supported by evidence in the record and should be affirmed.

**C. CP’s Remaining Challenges to the Council’s Decision Fail**

Ignoring the evidentiary support for the Council’s decision and disregarding the standard of review, CP instead devotes most of its argument to its claims that “[t]he City Council’s reasons were pretextual and its denial of the SIP was an arbitrary and capricious decision to prevent a McDonald’s from being built in that location.” (Op. br. at 25.) These claims have no merit.

*1. City Council’s decision was not pretextual*

CP first argues that the Council’s stated reasons for denying its application were pretextual. Specifically, CP maintains that the Council’s stated concerns were only a fig leaf for its disapproval of fast-food restaurants. (*Id.* at 26 (“the ‘nature of drive-through use’ is explicitly a reference to the proposed use and an improper basis to deny the SIP.”)). Since the Planned Development regulations permit fast-food restaurants, CP argues, this would be an improper basis for denial. (*See id.* at 26-27 (“If the City Council believes that drive-through use is inconsistent with the plan, then it never should have approved ‘restaurant/fast-food establishment’ as a principal use for the Property.”).) This argument fails for at least two reasons.

First, due to the limited scope of administrative review, courts generally will not consider claims that a government body acted for hidden or pretextual reasons. “[G]iven that the City Council’s stated reasons are supported by competent evidence, we will not attempt to read the collective mind of the City Council to determine whether its members were motivated by

improper considerations.” *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 720 (Colo. App. 2008). This is so even where testimony or discussion at the hearing included considerations that would have been an improper basis for decision. *Id.*; see *Whitelaw*, 2017 COA 47, ¶¶ 20-24. “When, as here, defendants articulated a rational reason for their decision which is related to a legitimate government interest, we will not look beyond it for evidence that the reason was a pretext.” *Norton v. Vill. of Corrales*, 103 F.3d 928, 933 (10th Cir. 1996). As discussed above, the Council’s decision is well-supported by record evidence; accordingly, the Court should decline CP’s invitation to impute improper motives. See *Whitelaw*, 2017 COA 47, ¶ 11 (“city council members are entitled to a ‘presumption of integrity, honesty, and impartiality.’”) (quoting *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983)).

Second, even if the Court were to consider this argument, it would fail on the merits. CP reasons that the reference in the Resolution to “the ‘nature of drive-through use’ is explicitly a reference to the proposed use,” fast-food restaurant, because “[d]rive-thrus are an ubiquitous feature of fast-food restaurants [and] the proposed McDonald’s is no different.” (Op. br. at 26.) It similarly posits that “the reference to ‘lack of outdoor eating spaces’” must be read as a reference to fast food because “[f]ast-food restaurants, by nature, do not have significant, if any, outdoor spaces for eating;” and likewise that “the reference to ‘high quality development’ must be read as a slight against fast-food restaurants as ‘lower quality’ restaurants.” (*Id.* at 27-28.)

CP offers no record evidence to support these presumptions. Worse, its logic is fatally flawed. The Parkway Plaza PD identifies “Restaurant/Fast Food Establishment” as a principal use, but neither the PD nor the Zoning Ordinance defines or otherwise states that this use categorically includes drive-throughs. Moreover, a reference to “drive-through use” is not

necessarily—much less “explicitly”—a reference to fast-food restaurants (or the proposed McDonald’s), because not all fast-food restaurants have drive-through lanes and not all drive-through businesses are restaurants. The same is true for “outdoor eating spaces.” (*See* CastlePines-1583-84 (discussing other McDonald’s restaurants with patio areas).) Indeed, it is quite possible to conceive of a fast-food restaurant that lacks a drive-through (e.g., Subway, Jersey Mike’s, Little Caesars, etc.) and includes an outdoor patio (e.g., Sonic, Dairy Queen, Good Times Burgers, etc.). Put another way, neither the existence of a drive-through nor the absence of outdoor seating is “inherent to the proposed use,” as CP would have it. (*Id.* at 30.)

CP’s unsupported and flawed reasoning does not meet its burden to overcome the presumption of integrity, honesty, and impartiality. The Council’s stated reasons are legitimate and supported by the record.<sup>3</sup>

2. *City Council properly considered the requirements of the Comprehensive Plan*

CP next argues in serial fashion that the Council erred in its reliance on elements of the Comprehensive Plan because (1) it would be impossible to fulfill all requirements of the Comprehensive Plan; (2) the Council previously approved an adjacent storage facility; and (3) the Council previously approved the Parkway Plaza PD under the Comprehensive Plan. None of these piecemeal arguments provide any ground to disturb the Council’s decision, particularly “where competent evidence exists to support [its] findings.” *O’Dell*, 920 P.2d at 50.

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<sup>3</sup> The opening brief also argues that “to the extent... [the City] attempt[s] to argue that the SIP should be denied because fast-food restaurants make unhealthy food” or “to the extent the City argues that the City Council could deny the SIP on the basis that a McDonald’s or fast-food restaurant use will inherently cause certain traffic problems, those arguments must be disregarded.” (Op. br. at 29.) Because the Council did not rely on such reasoning in its Resolution, CP’s arguments are inapposite.



CP repeats to this Court the arguments it made during the hearing suggesting that the Council should not be concerned if the application fails to meet specific requirements of the Comprehensive Plan, because “[n]o proposal could possibly meet the often conflicting goals and objectives” contained in the Plan. (Op. br. at 30-31 (citing CastlePines-1666-68).) When the Council based its Resolution on certain specific aspects of the Comprehensive Plan, such as walkability and community, CP argues, it thus “improperly require[d] that the SIP comply with every conceivable aspect of every single development goal.” (*Id.* at 31.) Again, CP relies on questionable logic. Granting *arguendo* that the goals and objectives listed in the Comprehensive Plan may be read to conflict with each other, the Council’s decision to consider or prioritize one or more specific requirements does not mean that it required 100% compliance with every aspect of the Comprehensive Plan.

As all agree, Section 2703.01(a) of the Castle Pines Zoning Ordinance requires that Council consider whether an “SIP supports the goals and objectives of the City of Castle Pines Comprehensive Plan.” (*See* op. br. at 7.) It is precisely the role of the City’s elected representatives to resolve any tensions or conflicts between different aspects of the Comprehensive Plan, and between the Comprehensive Plan and other zoning requirements, by weighing their relative importance in the specific circumstances of each SIP application. *See* Castle Pines Zoning Ordinance at §§ 2703.01; 2704.06.04; *Canyon Area Residents for the Env’t v. Bd. of Cnty. Comm’rs of Jefferson Cnty.*, 172 P.3d 905, 911 (Colo. App. 2006) (Board is entitled “to deference in evaluating whether there has been conformity and compliance with the county’s master or comprehensive plans”). To accept CP’s argument would be to either render

every such balancing an “abuse of discretion,” or to mandate approval of every SIP application that satisfied at least one objective of the Comprehensive Plan. That is not the law.

Perhaps recognizing this, CP shifts to argue instead that Council’s specific decision here was “arbitrary and capricious” because other, different proposals have been approved. “If a self-storage facility supports the Comprehensive Plan’s goals and objectives,” it declares, “then surely a McDonald’s does, too.” (Op. br. at 32; *see id.* at 32-33 (because Council approved the Parkway Plaza PD, “it logically follows that the McDonald’s SIP supports the Comprehensive Plan.”).) But even if CP could show that these other proposals were closely identical to its application (a showing it does not attempt), it provides no authority for the theory that one Council’s approval of a proposal or application in the past requires a subsequent Council to approve a different proposal today, even if it is in the same geographical area.<sup>4</sup> On the contrary, it is inherent in the Council’s discretion that it may learn lessons and apply its experience from prior approvals, and account for any changed circumstances. *See Whitelaw*, 2017 COA 47, ¶ 59 (not an abuse of discretion for Council to consider “changed circumstances” in rezoning determination).

3. *City Council properly relied on flaws in the traffic study*

Finally, in a similar vein, CP contends that the Council’s reliance on “purported shortcomings in the Traffic Study ... ignores that the City, in approving the Parkway Plaza PD,

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<sup>4</sup> The opening brief cites *Canyon Area Residents for the Env’t v. Bd. of Cnty. Comm’rs of Jefferson Cnty.*, 172 P.3d 905, 910 (Colo. App. 2006) for the proposition “that where a local government’s interpretation and application of its land use code is not uniform or consistent, courts do not extend deference to its legal interpretations.” But the cited discussion in *Canyon Area Residents* concerned canons of statutory interpretation, not a board’s approval or rejection of a land use application. Such decisions, as discussed *supra*, are accorded great deference.

already accepted a prior version of the traffic study” and that its “denial contradicts those earlier determinations.” (Op. br. 33.) It also objects that traffic was considered by the Council as an issue of “health, safety, and welfare” rather than as an issue of compliance with technical standards. (*Id.* at 36.) And again, CP argues that the Council’s conclusions were merely pretextual, masking “a new approval standard—one that would allow it to deny any new SIP if the planned development would increase traffic at all when there is a preexisting traffic problem.” (*Id.* at 39.) These arguments fail for familiar reasons.

CP argued at the hearing, and again in the opening brief, that the Council was bound to accept the traffic study included with the proposal because that study used the same industry-standard ITE methodology as the traffic study included with the earlier Parkway Plaza PD application. (*Id.* at 34; *see* CastlePines 1598-1600; 1668-69.) But again, an earlier Council’s acceptance of a different proposal, in a different context, need not bind a later Council facing a different proposal. And even if it could, the approval of a comprehensive planned development plan as a whole cannot be interpreted to mean, as CP implies, that the Council determined the traffic study *itself* “further[s] the public health, safety, convenience and general welfare of the community.”<sup>5</sup> Instead, the earlier decision on the Parkway Plaza PD plan was—like the decision here—based on a weighing of multiple considerations. That the Council arrived at a different determination for a different project does not establish an arbitrary and capricious abuse of discretion.

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<sup>5</sup> Indeed, this interpretation seems to fly in the face of CP’s simultaneous contention that the Council abused its discretion when it “analyzed the Traffic Study under the health, safety, and welfare Approval Standard, and not the fourth Approval Standard, which addresses compliance with technical standards and requirements, such as the ‘Traffic Impact Study Criteria’ within the City of Castle Pines Roadway Design & Construction Standards.” (Op. br. at 36.)

CP also argues—more precisely, simply declares without supporting authority—that traffic considerations may only be analyzed for “compliance with technical standards and requirements” under the Roadway Design & Construction Standards, and not as part of the “health, safety, and welfare” objective under the Comprehensive Plan. (Op. br. at 36-37.) This is incorrect. *Whitelaw*, 2017 COA 47, ¶ 54 (“We agree with the district court that the consideration of the public health, safety, and welfare criterion may, in certain instances, include a review of issues relating to traffic and parking.”) (citing *Town of Grand Lake v. Lanzi*, 937 P.2d 785, 789 (Colo. App. 1996)). It was not an abuse of discretion for the Council to include traffic as part of its analysis of “health, safety, and welfare.” Nor, for the same reason, was it the imposition of “a new (and improper) approval standard outside of the City’s code,” much less “an improper taking.” (Op. br. at 39.) The health, safety, and welfare objectives of the Comprehensive Plan were neither new nor unknown to CP when it filed its application.

Lastly, CP attacks the evidence relied upon by the Council regarding traffic safety, criticizing Council for “repeat[ing] unsupported public comments” and allegedly disregarding the conclusions of staff, CP’s traffic engineers, and the traffic study. Again, CP asks the Court to reweigh evidence and make credibility determinations inappropriate on Rule 106(a)(4) review. Again, the Court should decline. *W. Paving Const. Co. v. Jefferson Cnty. Bd. of Cnty. Comm’rs*, 689 P.2d 703, 706 (Colo. App. 1984) (“Western infers that citizens’ testimony cannot be believed when professional planners and engineers found that the road could physically handle the gravel trucks. We find this argument to be without merit.”).

#### IV. CONCLUSION

For all the reasons stated above, this Court should reject Plaintiff's arguments and affirm the decision of the City Council.

Respectfully submitted this 24th day of January 2025.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file at  
Berg Hill Greenleaf Ruscitti LLP]*

*s/ Geoffrey C. Klingsporn*

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Geoffrey C. Klingsporn  
Josh A. Marks

*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of January, 2025, a true and correct copy of the foregoing **DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE PINES' ANSWER BRIEF** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

Jonah G. Hunt  
Marcus T. Wile  
Orten Cavanagh Holmes & Hunt, LLC  
1445 Market Street, Suite 350  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

---

Cheryl Stasiak



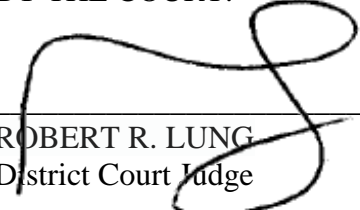
DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED January 22, 2025 2:59 PM
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<p style="text-align: center;"><b>ORDER GRANTING DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE  PINES' REQUEST FOR UNIFIED EXTENSION AND JOINDER IN THE CASTLE  PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1's UNOPPOSED MOTION  FOR EXTENSION OF TIME TO FILE ANSWER BRIEF</b></p>	

This matter comes before the Court on Defendant City Council for the City of Castle Pines' Request for Unified Extension and Joinder in the Castle Pines North Homeowners Association, No. 1's Unopposed Motion for Extension of Time to File Answer Brief. The Court, having reviewed the Motion, any related pleadings or filings, and being fully advised in the matter, enters the following order:

The Motion is HEREBY GRANTED. Defendant and the Intervenor shall have up to and including January 24, 2025 to file answer briefs.

Dated this 22nd day of January, 2025.

BY THE COURT:

  
\_\_\_\_\_  
ROBERT R. LUNG  
District Court Judge



DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED January 15, 2025 1:55 PM
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
Josh A. Marks, Atty. Reg. # 16953 Geoffrey C. Klingsporn, Atty. Reg. # 38997 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com geoff.klingsporn@bhgrlaw.com	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<p style="text-align: center;"><b>DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE PINES' REQUEST  FOR UNIFIED EXTENSION AND JOINDER IN THE CASTLE PINES NORTH  HOMEOWNERS ASSOCIATION, NO. 1's UNOPPOSED MOTION FOR  EXTENSION OF TIME TO FILE ANSWER BRIEF</b></p>	

Defendant, City Council for the City of Castle Pines, Colorado, (the “City”), by and through its counsel of record, Josh A. Marks and Geoffrey C. Klingsporn of Berg Hill Greenleaf Ruscitti LLP, does hereby join in the Castle Pines North Homeowner’s Association’s (“HOA”) Motion for Extension of Time to File Answer Brief and it further requests an expansion of that Motion to include the City in the new Answer Brief deadline, as follows:

1. This matter concerns a claim for judicial review under C.R.C.P. 106(a)(4). An Opening Brief has been filed by Plaintiff and the current Answer Brief deadline is January 15, 2025. The Intervenor HOA just filed a request to extend its deadline for filing its Answer Brief.

2. In conferral with the parties prior to the filing of the HOA's Motion for Extension<sup>1</sup>, the City indicated it was amenable to the Intervenor's proposed extension of time to file the answer brief, so long as the extension also applied to the City's answer brief.

3. The HOA's Motion and proposed Order, however, omitted this aspect from its filings.

4. The City is unaware of any opposition to extending the new date to cover all answer briefs and requests that the Court extend the Answer Brief deadline generally and not just for the HOA.

5. A proposed order to that effect is filed contemporaneously herewith.

WHEREFORE, The City requests the Court to grant the motion for extension but apply this to the City's and the HOA's answer briefs, resulting in an answer brief deadline for all parties up to and including January 24, 2025.

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<sup>1</sup> **Certificate of Conferral**. As required by C.R.C.P. 121, §1-15, ¶8, undersigned counsel conferred with counsel prior to filing this Joinder in The Castle Pines North Homeowners Association, No. 1's Unopposed Motion for Extension of Time to File Answer Brief. Undersigned counsel is authorized to state that Plaintiff and the Intervenor **do not** oppose the requested extension.

Respectfully submitted this 15th day of January, 2025.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file  
at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Josh A. Marks*

---

Josh A. Marks  
Geoffrey C. Klingsporn

*Attorneys for City Council  
for the City of Castle Pines, Colorado*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of January, 2025, a true and correct copy of the foregoing **DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE PINES' REQUEST FOR UNIFIED EXTENSION AND JOINDER IN THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1's UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE ANSWER BRIEF** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

Jonah G. Hunt  
Marcus T. Wile  
Orten Cavanagh Holmes & Hunt, LLC  
1445 Market Street, Suite 350  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

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Cheryl Stasiak

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED January 15, 2025 1:55 PM
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<p style="text-align: center;"><b>ORDER GRANTING DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE  PINES' REQUEST FOR UNIFIED EXTENSION AND JOINDER IN THE CASTLE  PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1's UNOPPOSED MOTION  FOR EXTENSION OF TIME TO FILE ANSWER BRIEF</b></p>	

This matter comes before the Court on Defendant City Council for the City of Castle Pines' Request for Unified Extension and Joinder in the Castle Pines North Homeowners Association, No. 1's Unopposed Motion for Extension of Time to File Answer Brief. The Court, having reviewed the Motion, any related pleadings or filings, and being fully advised in the matter, enters the following order:

The Motion is HEREBY GRANTED. Defendant and the Intervenor shall have up to and including January 24, 2025 to file answer briefs.

Dated this \_\_\_\_ day of January, 2025.

BY THE COURT:

\_\_\_\_\_  
ROBERT R. LUNG  
District Court Judge



***Certificate of Conferral Pursuant to C.R.C.P. 121 § 1-15:*** Prior to the filing of this motion, the undersigned conferred with all other counsel who advised that the relief requested in this motion is not opposed. Defendant City Council for The City of Castle Pines, Colorado joins in the requested extension.

1. The Association's deadline to file an Answer Brief is currently Wednesday, January 15, 2025.

2. The Association was designated as a nonparty in CCEF which prohibited it from accessing the underlying record and documentation. It was just granted full access the a.m. of January 13, 2024.<sup>1</sup>

3. Given the complexities presented in this case, undersigned's office needs sufficient time to review the underlying record and continue drafting its Answer Brief.

4. Accordingly, the Association requests a short extension of time to file its Answer Brief up to and including January 24, 2025.

5. No prejudice will be incurred by any party as a result of the requested relief sought, as this request is unopposed.

6. C.R.C.P. 6(b) provides for the enlargement of time upon motion made before the expiration of the specified period.

7. This the Association's first request for extension in this matter.

WHEREFORE, The Castle Pines North Homeowners Association, No. 1 respectfully moves this Court to enter an Order granting it an extension of time up to and including January

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<sup>1</sup> The Association extends its gratitude to Ms. Bivens for her assistance.

24, 2025, to file its Answer Brief and for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 14th day of January, 2025.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt  
Jonah G. Hunt, No. 34379  
Marcus T. Wile, No. 49471

*Attorneys for The Castle Pines North Homeowners  
Association, No. 1*

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 14, 2025, a true and correct copy of the foregoing **THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE ANSWER BRIEF** was served via LexisNexis/CCEF/U.S. Mail/Email upon the following:

*Counsel of record.*

/s/ Chris A. Cowlishaw  
Chirs A. Cowlishaw, Litigation Paralegal



DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED January 14, 2025 11:02 AM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	▲ COURT USE ONLY ▲ Case No.: 2024CV30582  Div.:
<p style="text-align: center;"><b>ORDER GRANTING THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S <u>UNOPPOSED</u> MOTION FOR EXTENSION OF TIME TO FILE ANSWER BRIEF</b></p>	

THIS MATTER has come before the Court on Intervenor The Castle Pines North Homeowners Association, No. 1's Unopposed Motion for Extension of Time to File Answer Brief up to and including January 24, 2025.

THE COURT, being fully advised in the premises hereby GRANTS said Motion. The Association has until January 24, 2025, in which to file its Answer Brief.

DATED: \_\_\_\_\_, 2025.

BY THE COURT

\_\_\_\_\_  
 District Court Judge



Respectfully submitted this 9th day of January, 2025.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt  
Jonah G. Hunt, No. 34379

*Attorney for Defendant The Castle Pines North  
Homeowners Association, No. 1*

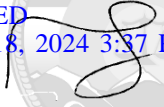
**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of January, 2025, a true and correct copy of the foregoing was served via CCE-Filing System/Email/U.S. Mail upon the following:

*All counsel of record.*

/s/ Chris A. Cowlshaw  
Chris A. Cowlshaw, Litigation Paralegal

**GRANTED BY COURT**  
**12/18/2024**

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED December 18, 2024 3:37 PM  <b>ROBERT RAYMOND LUNG</b> District Court Judge
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	<b>▲ COURT USE ONLY ▲</b>
	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<b>PROPOSED ORDER GRANTING DEFENDANT'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE ANSWER BRIEFS</b>	

This matter comes before the Court on Defendant City Council for the City of Castle Pines, Colorado's Unopposed Motion for Extension of Time to File Answer Briefs. The Court, having reviewed the Motion, any related pleadings or filings, and being fully advised in the matter, enters the following order:

The Motion is HEREBY GRANTED. Defendant and the Intervenor shall have up to and including January 15, 2025 to file answer briefs.

Dated this \_\_\_\_\_ day of December, 2024.

BY THE COURT:

\_\_\_\_\_  
ROBERT R. LUNG  
District Court Judge

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED December 17, 2024 6:03 PM
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
Josh A. Marks, Atty. Reg. # 16953 Geoffrey C. Klingsporn, Atty. Reg. # 38997 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com geoff.klingsporn@bhgrlaw.com	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<p style="text-align: center;"><b>DEFENDANT’S UNOPPOSED MOTION FOR EXTENSION OF TIME TO  FILE ANSWER BRIEFS</b></p>	

Defendant, City Council for the City of Castle Pines, Colorado, (the “City”), by and through its counsel of record, Josh A. Marks and Geoffrey C. Klingsporn of Berg Hill Greenleaf Ruscitti LLP, and pursuant to C.R.C.P. 6(b) and 121, §1-11, respectfully seeks a 28-day extension of time, up to and including January 15, 2025, to file answer briefs. As grounds in support of this request, the City states as follows:

**Certificate of Conferral.** As required by C.R.C.P. 121, §1-15, ¶8, undersigned counsel conferred with counsel prior to filing this Unopposed Motion for Extension of Time. Undersigned counsel is authorized to state that Plaintiff and the Intervenor **does not** oppose the requested extension.

1. Plaintiff in this matter seeks review of a quasi-judicial decision under C.R.C.P. 106(a)(4) and for review of the Defendant's denial of Plaintiff's proposed Site Improvement Plan.

2. After seeking and receiving two extensions, Plaintiff filed their Opening Brief under C.R.C.P. 106(a)(4) on November 13, 2024, making Defendant's Answer Brief due on December 18, 2024 under the presumptive briefing schedule contained in Rule 106(a)(4)(VII).

3. The change in the briefing schedule triggered by Plaintiff's extension pushed the drafting of the Answer Brief into a time frame that creates particular challenges for the City to timely file that brief. Additional time is needed for Defendant to file its Answer Brief due in large part to pre-existing deadlines in other cases. In addition, the Court just today further approved of the Intervenor's participation in this matter. Accordingly, Defendant's counsel seeks a 28-day extension to January 15, 2025 for the filing of any Answer Briefs.

4. This extension of time will not prejudice the Plaintiff, particularly given that this Motion is unopposed and this adds a modest amount of time to the briefing schedule, which also benefits the Intervenor.

5. Pursuant to C.R.C.P. 121 § 1-11, the undersigned has served a copy of this Motion upon the City.

WHEREFORE, the City respectfully requests that this Court grant it an extension to file Answer Briefs up to and including January 15, 2025. As required by the Colorado Rules of Civil Procedure, a proposed order granting this Motion is filed herewith.

Respectfully submitted this 17th day of December 2024.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file  
at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Geoffrey C. Klingsporn*

---

Josh A. Marks

Geoffrey C. Klingsporn

*Attorneys for City Council  
for the City of Castle Pines, Colorado*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of December 2024, a true and correct copy of the foregoing **DEFENDANT'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE ANSWER BRIEFS** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
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Denver, CO 80202

Jonah G. Hunt  
Marcus T. Wile  
Orten Cavanagh Holmes & Hunt, LLC  
1445 Market Street, Suite 350  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

---

Cheryl Stasiak



DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	<div>DATE FILED December 17, 2024 6:03 PM</div> <div>▲ COURT USE ONLY ▲</div>
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO  <b>Defendant-Intervenor:</b> THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1	
Case Number: 2024CV30582  Div.: 6      Ctrm.:	
<p align="center"><b>PROPOSED ORDER GRANTING DEFENDANT’S UNOPPOSED MOTION FOR  EXTENSION OF TIME TO FILE ANSWER BRIEFS</b></p>	

This matter comes before the Court on Defendant City Council for the City of Castle Pines, Colorado’s Unopposed Motion for Extension of Time to File Answer Briefs. The Court, having reviewed the Motion, any related pleadings or filings, and being fully advised in the matter, enters the following order:

The Motion is HEREBY GRANTED. Defendant and the Intervenor shall have up to and including January 15, 2025 to file answer briefs.

Dated this \_\_\_\_\_ day of December, 2024.

BY THE COURT:

\_\_\_\_\_  
ROBERT R. LUNG  
District Court Judge

DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED December 17, 2024 1:50 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO	▲ COURT USE ONLY ▲ Case No.: 2024CV30582 Div.:
<p style="text-align: center;"><b>ORDER GRANTING THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S MOTION TO INTERVENE</b></p>	

THIS MATTER comes before the Court on The Castle Pines North Homeowners Association, No. 1's motion to intervene, and the Court being duly advised in this matter and upon consideration and finding good cause,

HEREBY ORDERS that the Motion is GRANTED and the Court further orders, adjudges and decrees as follows:

- 1) The Castle Pines North Homeowners Association, No. 1 is hereby added as a party to this action, and
- 2) The Castle Pines North Homeowners Association, No. 1's Answer to Plaintiff's Complaint, filed contemporaneously with Plaintiff's Motion to Intervene, is hereby accepted for filing on the Court's Docket.

Dated this 17th day of December, 2024.

BY THE COURT:

\_\_\_\_\_  
 Judge/Magistrate

NOTE: This motion being granted does not change the nature of the limited purpose of this action as an appeal of the City's actions under Rule 106(4) and the Court will not allow the Intervenor to cloud the issues or expand the very limited purpose of this case.

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED December 17, 2024 8:34 AM          ▲ COURT USE ONLY ▲
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	
	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>ORDER GRANTING PLAINTIFF'S SECOND UNOPPOSED MOTION FOR EXTENSION OF TIME OF BRIEFING SCHEDULE</b></p>	

THIS MATTER comes before the Court on Plaintiff's Second Unopposed Motion for Extension of Time of Briefing Schedule ("Motion").

The Court, having reviewed the Motion and being otherwise fully advised in the matter, hereby GRANTS the Motion and ORDERS that Plaintiff's shall file its Opening Brief on November 13, 2024, Defendant's Answer Brief is due 35 days after service of Plaintiff's Opening Brief, and Plaintiff's Reply Brief is due 14 days after service of Defendant's Answer Brief.

DATED this 17th day of December, 2024.

BY THE COURT

\_\_\_\_\_  
 District Court Judge

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED November 13, 2024 5:26 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 Alexander P. Jack, #60682 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com; ajack@bhfs.com	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>PLAINTIFF’S OPENING BRIEF</b></p>	

Plaintiff CP Commercial, LLC (“CP Commercial”), through undersigned counsel, submits its Opening Brief in this original proceeding challenging the actions of the City Council for the City of Castle Pines, Colorado (the “City Council”).

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the requirements of C.A.R. 28 and 32 to the extent such requirements are consistent with and/or applicable to the Colorado Administrative Procedures Act, C.R.S. § 24-4-106. Specifically, the undersigned certifies that:

**The brief complies with the formatting requirements set forth in C.A.R. 28(a).**

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

It contains 9,498 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28.**

*s/David B. Meschke*

David B. Meschke

## **TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
STATEMENT OF FACTS .....	2
A. The Property .....	2
B. The Parkway Plaza Planned Development.....	4
C. The Site Improvement Plan Application Process and Approval Standards .....	7
D. The McDonald’s Site Improvement Plan.....	9
E. The Planning Commission Succumbs to Public Pressure.....	11
F. The City Council Erroneously Denies the SIP at a Public Meeting .....	12
i. City staff recommends approval of the SIP. ....	12
ii. City Council hears the presentation from the Applicants. ....	13
iii. The traffic impact study explains that current proposed uses would result in less traffic. ....	15
iv. The City Council’s public meeting drew considerable interest from the public regarding irrelevant issues and the proposed use.....	16
v. The Applicants’ rebuttal refocuses attention to the relevant issues....	18
vi. Councilmembers’ deliberations wrongly focused on use.....	19
vii. Councilmembers’ decision to deny the SIP was not supported by the evidence.....	22
STANDARD OF REVIEW .....	23
ARGUMENT .....	24
I. The City Council Abused Its Discretion in Denying the McDonald’s SIP. .....	24
A. The City Council Cannot Deny the SIP for Reasons Related to the Proposed Fast-Food Restaurant Use.....	25
B. The City Council’s Stated Reasons for Denying the SIP under the Comprehensive Plan Approval Standard Overlook the Scope of Its Review and Its Prior Determinations. ....	30

C.	The City Council’s Decision to Deny the Site Plan on the Basis of Health, Safety, and Welfare Is Contrary to the Planned Development’s Prior Approval. ....	33
D.	The City Council Analyzed Traffic under the Wrong Approval Standard. ....	36
E.	The City Council’s Decision Creates New Traffic Standards Contrary to the City’s Code. ....	37
F.	No Competent Evidence Supports the SIP’s Denial. ....	40
CONCLUSION.....		44

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Beaver Meadows v. Bd. of Comm’rs of Larimer Cnty.</i> , 709 P.2d 928 (Colo. 1985).....	23
<i>Bennett v. Colo. Dep’t. of Rev., Div. of Motor Vehicles</i> , 2024 COA 97, ¶ 29 .....	5
<i>Canyon Area Residents for the Env’t v. Bd. of Cnty. Comm’rs of Jefferson Cnty.</i> , 172 P.3d 905 (Colo. App. 2006).....	32
<i>City of Colo. Springs v. Francisco Serna &amp; BirdDog LLC</i> , No. 23CA1710, 2024 WL 4053209 (Colo. App. Sept 5, 2024).....	5
<i>City of Colo. Springs v. Givan</i> , 897 P.2d 753 (Colo. 1995).....	23, 40
<i>Colo. Mun. League v. Mountain States Tel. &amp; Tel. Co.</i> , 759 P.2d. 40 (Colo. 1998).....	24, 31, 40, 44
<i>Forest View Co. v. Town of Monument</i> , 464 P.3d 774 (Colo. 2020).....	39
<i>No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs of Larimer Cnty.</i> , 507 P.3d 1053, 1060 (Colo. App. 2022).....	23
<i>Ross v. Fire Police Pension Ass’n</i> , 713 P.2d 1304 (Colo. 1986).....	23
<i>Save Our St. Vrain Valley v. Boulder Cnty. Bd. of Adjustment</i> , 491 P.3d 562 (Colo. App. 2021).....	23
<b>Statutes</b>	
Castle Pines, Colo., Municipal Code .....	6



Castle Pines, Colo., Municipal Code § 2-2-10 .....	7
Castle Pines, Colo., Subdivision Ordinance .....	7
Castle Pines, Colo., Zoning Ordinance § 11-1102.11 .....	4
Castle Pines, Colo., Zoning Ordinance § 15.....	4, 5, 34
Castle Pines, Colo., Zoning Ordinance § 27.....	7, 8, 12, 14, 20, 21
Castle Pines Zoning Ordinance § 27-2702 .....	7
Castle Pines Zoning Ordinance § 27-2703.01 .....	7
Castle Pines Zoning Ordinance § 27-2704.06.03 .....	9
Castle Pines Zoning Ordinance § 27-2705.01 .....	12
Castle Pines Zoning Ordinance § 27-2705.02 .....	12

## **Other Authorities**

City of Castle Pines, <i>City of Castle Pines Roadway Design and Construction Standards</i> (Nov. 11, 2:03 PM), <a href="https://www.castlepinesco.gov/wp-content/uploads/2024/07/CASTLE-PINES-ROADWAY-DESIGN-AND-CONSTRUCTION-STANDARDS.pdf">https://www.castlepinesco.gov/wp-content/uploads/2024/07/CASTLE-PINES-ROADWAY-DESIGN-AND-CONSTRUCTION-STANDARDS.pdf</a> .....	8
City of Castle Pines, <i>Land Use Controls and Private Property Rights</i> (Nov. 11, 2024 3:00 PM), <a href="https://www.castlepinesco.gov/land-use-controls-and-private-property-rights/">https://www.castlepinesco.gov/land-use-controls-and-private-property-rights/</a> .....	25
C.R.C.P. 106(a)(4) .....	2, 23
Douglas County, Colorado, Department of Public Works, Engineering Division, <i>Appendix B-Traffic Impact Study Criteria</i> (Nov. 11, 2024 1:50 PM), <a href="https://www.douglas.co.us/documents/rwd-guidelines-for-traffic-impact.pdf">https://www.douglas.co.us/documents/rwd-guidelines-for-traffic-impact.pdf</a> .....	5

## **INTRODUCTION**

The City Council for the City of Castle Pines, Colorado (“City Council”) erroneously denied a site improvement plan for a fast-food restaurant because it proposed a McDonald’s. After listening to a barrage of public comments from vocal residents, including comments that McDonald’s would bring “transients” and “those people” to Castle Pines (the “City”), a majority of the councilmembers heeded public pressure and denied the site improvement plan. In doing so, the councilmembers cited to pretextual and unsupportable reasons—an already existing traffic problem and a fast-food restaurant’s supposed incompatibility with certain goals in the City’s comprehensive plan such as walkability and high-quality development.

The City Council abused its discretion. Never mind that the City’s staff had recommended approval or that the City Council had approved a planned development for the area just one year earlier that expressly permits fast-food restaurant use for the site. Indeed, as part of the approval of the planned development, and after reviewing a traffic study for the development, the City Council determined that (a) the rezoning would further the public health, safety, convenience, and general welfare of the community, and (b) it met the approval criteria, including that the application complies with the City’s comprehensive plan and would not create traffic congestion or burden the existing road network. And the

rezoning was not even new. Not only did the rezoning of the property permit a “fast-food establishment” as a principal use, but the prior zoning also had permitted this use for the site. Yet, the City Council denied the plan because of that very use and cannot now hide behind site plan criteria to disavow that decision.

The City’s land use code does not allow the City Council to deny a site improvement plan because it disagrees with a permitted use. If the City Council did not want a fast-food restaurant in that location, it should never have approved “fast-food establishment” as a permitted use. Permitted uses are allowed by right. Rather, the City Council was limited to deciding whether the McDonald’s site improvement plan complied with the applicable approval standards. No competent evidence supports the City Council’s denial. Therefore, because the City Council’s decision to deny the plan was arbitrary and capricious and cannot withstand scrutiny under C.R.C.P. 106(a)(4), it must be overturned and vacated.

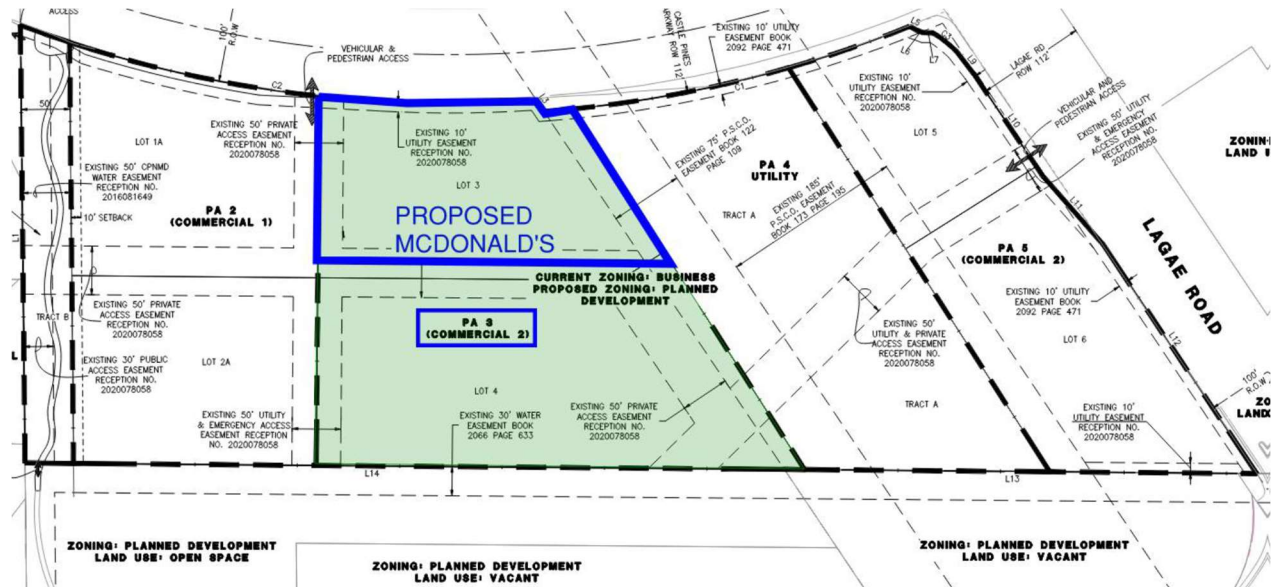
## **STATEMENT OF FACTS**

### **A. The Property**

CP Commercial is a Colorado limited liability company that owns approximately 1.3 acres (the “Property”) generally located at the southwest intersection of Castle Pines Parkway and Lagae Road in Castle Pines, Colorado.

(Administrative Record for Castle Pines Appeal (“CastlePines”)-0104–05.)<sup>1</sup> The Property is located on Lot 3 of the Lagae Family Trust Minor Development. (CastlePines-0105, 0117.) The surrounding land uses to the north, south, east, and west are designated for commercial purposes. (CastlePines-0106, 1449.)

The Property is roughly rectangular and is bounded by Castle Pines Parkway to the north, a drainage tract to the east, and a private drive to the south and west. (CastlePines-0105, 0117, 1453.) The private drive connects the Property to Castle Pines Parkway to the north and Lagae Road to the east. (CastlePines-0105, 1457.) A map of the Property’s location is below:



(CastlePines-1449.)

<sup>1</sup> The Administrative Record is Bates labeled as “CastlePines-[page number].”

Douglas County originally zoned the area as a “Business District” in the 1950s. (CastlePines-0106.) When the City was incorporated in 2008, the Property was included in the City’s boundaries and maintained the Business District zoning. (*Id.*) Under Paragraph 1102.11 of Section 11 of the City of Castle Pines Zoning Ordinances,<sup>2</sup> “Restaurant/fast-food establishment” is a principal use for Business Districts. (CastlePines-1717.)

**B. The Parkway Plaza Planned Development**

On or about August 8, 2023, the City Council approved the plan for the Parkway Plaza Planned Development (“Parkway Plaza PD”), Case No. RPD-2022-002, as part of Ordinance No. 23-09. (CastlePines-1766–71.) The Property is located within this development. (CastlePines-0105–06.)

The City Council’s approval of the Parkway Plaza PD is especially relevant for this appeal. Section 15 of the City of Castle Pines Zoning Ordinances contains specific approval criteria for planned development rezoning, including:

- “1503.01 whether the application is in compliance with the requirements of this Ordinance and the City Comprehensive Master Plan”; and

---

<sup>2</sup> The City’s Zoning Ordinances are incorporated by reference into record and can be found at: <https://www.castlepinesco.gov/city-services/city-departments/community-development/land-use-zoning/zoning/zoning-ordinances/>. Sections 1, 2, 11, 15, and 27 of the Zoning Ordinances have been specifically included in the Administrative Record. (*See* CastlePines-1705–1762.)

- “1503.07 whether the intended land use would create traffic congestion or burden the existing road network.”

(CastlePines-1721–22.) In Ordinance No. 23-09, the City Council expressly acknowledges that it considered the approval criteria, and then states that the proposed rezoning and the planned development plan “further the public health, safety, convenience and general welfare of the community and meet the criteria of approval set forth in Section 15 of the Zoning Ordinance.” (CastlePines-1766–67.)

The City also requires that certain documents be submitted with the development plan, including “[a] traffic study prepared in accordance with the Douglas County Roadway Design and Construction Standards . . . .” (CastlePines-1724 (¶ 1507.07).) The Traffic Impact Study Criteria included in the standards specifies that “Trip generation rates from the most current [Institute of Transportation Engineers] Trip Generation manual shall be used.”<sup>3</sup> A traffic study was submitted and approved by the City for both the Lagae Family Trust Minor

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<sup>3</sup> The Douglas County Roadway Design and Construction Standards’ Traffic Impact Study Criteria is publicly available. Douglas County, Colorado, Department of Public Works, Engineering Division, *Appendix B—Traffic Impact Study Criteria* (Nov. 11, 2024 1:50 PM), <https://www.douglas.co.us/documents/rwd-guidelines-for-traffic-impact.pdf/>. This Court can take judicial notice of various sections of the City’s website. *Bennett v. Colo. Dep’t. of Rev., Div. of Motor Vehicles*, 2024 COA 97, ¶ 29; *City of Colo. Springs v. Francisco Serna & BirdDog LLC*, No. 23CA1710, 2024 WL 4053209, at \*4 n.4 (Colo. App. Sept 5, 2024).

Development in May 2020 and the rezoning of that property as part of the Parkway Plaza PD in 2023. (CastlePines-1435.)

As a result, the Property is located within Planning Area 3 (“PA 3”) of the Parkway Plaza PD. (CastlePines-0106.) As part of the planned development’s approval, the Property was rezoned, resulting in PA 3 being currently zoned as Commercial 2. (CastlePines-0106–07.) Commercial 2 permits various principal uses, including a “fast-food establishment.” (CastlePines-1763–65 (specifying in the recorded planned development that “restaurant/fast-food establishment” is a “principal use”); *see also* CastlePines-0106–07, 1475.) The proposed McDonald’s drive-thru restaurant is a fast-food establishment and therefore a permitted principal use. (CastlePines-0109, 1475.)

The Property also must adhere to certain standards if it is to be developed.<sup>4</sup> The Parkway Plaza PD outlines specific development standards, including minimum building setback and height requirements. (CastlePines-0107.) In addition, the Castle Pines Municipal Code (“Municipal Code”) outlines minimum and maximum parking requirements by type of use, including for drive-in restaurants, as well as lighting standards. (*Id.*)

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<sup>4</sup> The area governed by the Parkway Plaza Planned Development is currently undeveloped. (CastlePines-0106.)

**C. The Site Improvement Plan Application Process and Approval Standards**

Before a McDonald's can be constructed and operated on the Property, the City requires an application for a site improvement plan ("SIP") to be submitted pursuant to Section 27 of the City of Castle Pines Zoning Ordinances. (See CastlePines-1746–62.) Specifically, Paragraph 2702 of Section 27 requires an approved SIP before a building permit is issued. (CastlePines-1746.) As part of the submittal, Paragraph 2704.03 requires that the submittal include, among other documents, a project narrative, a landscape plan, building elevations, a lighting plan, and a traffic impact analysis. (CastlePines-1747–78.)

The relevant governmental body—the City of Castle Pines Planning Commission ("Planning Commission") or the City Council on appeal<sup>5</sup>—evaluates all SIP applications under the following five criteria in Paragraph 2703.01 of Section 27 (the "Approval Standards"):

- "The SIP supports the goals and objectives of the City of Castle Pines Comprehensive Plan (the "Comprehensive Plan"); and
- The SIP is consistent with the City of Castle Pines Subdivision Ordinance and the development and use standards of the City of Castle Pines Zoning Ordinance and Planned Development, as applicable; and

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<sup>5</sup> Under Section 2-2-10 of the Municipal Code, the City Council is the legislative body for the City.



- The SIP complies with and is responsive to the overall intent and vision embodied in the City-adopted Mixed-Use Design Guidelines, as determined by the City; and
- The SIP complies with the City’s technical standards and requirements including the City of Castle Pines Roadway Design & Construction Standards Manual;<sup>6</sup> City of Castle Pines Storm Drainage Design & Technical Criteria Manual; and City of Castle Pines Grading, Erosion and Sediment Control (GESD) Manual; and
- The SIP furthers the public health, safety and welfare of the community.”

(CastlePines-1747.) Section 27 does not provide any details on how a SIP can further the public health, safety, and welfare of the community.

The City’s Comprehensive Plan was recently updated and adopted by the City Council in 2021. (CastlePines-1772.) It sets forth the community’s vision for the next 20 years based on a framework of five community interests: (1) parks, recreation, and amenities; (2) economic development; (3) housing; (4) transportation; and (5) land use and growth management. (CastlePines-1785.) As it specifically relates to restaurants, the Comprehensive Plan notes that “[m]any community members mentioned the need for more retail, service, and restaurant

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<sup>6</sup> The City of Castle Pines Roadway Design & Construction Standards Manual also incorporates ITE methodology under its Traffic Impact Study Criteria in Chapter 6. See City of Castle Pines, *City of Castle Pines Roadway Design and Construction Standards* (Nov. 11, 2:03 PM), <https://www.castlepinesco.gov/wp-content/uploads/2024/07/CASTLE-PINES-ROADWAY-DESIGN-AND-CONSTRUCTION-STANDARDS.pdf>.

options.” (CastlePines-1803.) Written comments attached to the Comprehensive Plan include that the City should “[b]ring in more business. How is it we have only 1 fast food drive through in this entire town!?!?” (CastlePines-1873.) And the stakeholder summary in the Comprehensive Plan notes that the City “[n]eed[s] more restaurants and breakfast places.” (CastlePines-1883.)

The Planning Commission initially determines whether a SIP complies with the Approval Standards. (CastlePines-1748.) An applicant may appeal its denial to the City Council within 30 days pursuant Paragraph 2704.06.03 of Section 27. (*Id.*) The City Council, in a quasi-judicial role, then conducts de novo review as to whether a SIP complies with the Approval Standards. (*Id.*)

#### **D. The McDonald’s Site Improvement Plan**

The proposed SIP for the Property proposes an approximately 3,671 square-foot McDonald’s fast-food restaurant with a dual drive-thru, parking, landscaping, and associated utilities. (CastlePines-0104, 1452.) The SIP specifies that the restaurant building will be located in the center of the site, with the drive-thru windows facing Castle Pines Parkway and the primary entrance and parking lot facing the interior of the site. (CastlePines-0104, 1459.) The SIP also proposes a landscape plan containing both deciduous and evergreen trees and shrubs that offer various heights, colors, and seasonal interest that helps soften and shade the site and

provide buffering and screening of the building and drive-thru. (CastlePines-0104, 1460.) A rendering of the proposed building is below:



(CastlePines-1456.)

The SIP for the McDonald's meets the relevant development, parking, and lighting standards, and well as other submittal requirements. (CastlePines-0107–08.) The proposed building would have a setback from Castle Pines Parkway of 47.5 feet, which is above the minimum setback requirement of 20 feet. (CastlePines-0107, 1458.) It also would have a maximum building height of 23 feet, 9 ½ inches, which is below the maximum permitted height of 40 feet. (CastlePines-0107, 1462.) The SIP also meets the parking standards for drive-in restaurants containing three drive-up windows by providing 38 parking spaces (the minimum is 37 spaces and the

maximum is 41 spaces) and providing the required 18 stacking spaces in the drive-thru lane. (CastlePines-0107.) The SIP also meets all lighting standards because it proposes full-cutoff lighting, which conforms to maximum illuminance levels and would keep light from spilling onto adjacent property. (CastlePines-0107–08, 1461.) In addition, the SIP meets submittal requirements by providing a Master Traffic Impact Letter and a Phase III Drainage Report. (CastlePines-0108; *see also* CastlePines-0829–1023.)

**E. The Planning Commission Succumbs to Public Pressure**

On behalf of CP Commercial and McDonald’s USA, LLC, Kimley-Horn, an engineering and design consultant, submitted the SIP and supporting documents to the Planning Commission. (CastlePines-1450.)

The Planning Commission received numerous comments opposed to the proposed use as a McDonald’s. Although 10 of the 11 external agency comments received as part of the process were either “no comment” or included comments that were technical in nature and reconciled through an iterative review process, (CastlePines-0108, 1054–1057, 1064–1104), the Castle Pines North HOA 1 submitted a vigorous opposition primarily based on concerns about the proposed *use*, and not whether the SIP met the Approval Standards. (CastlePines-0108.) The HOA addressed the proposed hours of operation, building design, traffic, crime risk,

litter and trash, and light, noise, and smoke pollution, among other things. (*Id.*) In addition, the City received 147 comments from residents that mostly were either opposed to the restaurant brand or echoed the HOA’s concerns. (CastlePines-0108, 1105–1271.) Nevertheless, a few comments supported the application because it would provide a new fast-food restaurant option. (*See e.g.*, CastlePines-1140.)

The Planning Commission denied the SIP in a 5-2 vote on March 28, 2024. (CastlePines-0104.) Kimley-Horn, through counsel, subsequently filed a written notice of appeal on April 17, 2024. (CastlePines-1044.)<sup>7</sup>

**F. The City Council Erroneously Denies the SIP at a Public Meeting**

*i. City staff recommends approval of the SIP.*

Before the City Council public meeting, City staff carefully analyzed the SIP in relation to each criterion in Section 27, and determined that the SIP met the submission requirements and the Approval Standards. (CastlePines-0795–0801.) Specifically, City staff found that the SIP supports Comprehensive Plan’s goals and objectives for the following reasons:

- The SIP meets Land Use and Growth Goal LU-2.2 because the building design, scale, and orientation are compatible with the surrounding natural and built environment, and the building would

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<sup>7</sup> All written notices and posted notices advising of the SIP’s public hearing before the City Council were executed in conformance with Paragraphs 2705.01 and 2705.02 of Section 27. (CastlePines-1045–1053.)

orient towards Castle Pines Parkway to create an aesthetically pleasing view;

- The SIP meets Economic Development Goals ED-1.3 because a new fast food business for the community to eat, work, and gather and can help activate the area to attract future business development;
- The SIP meets Economic Development Goals ED-2.5 because the landscape plan contains both deciduous and evergreen trees and shrubs that offer a variety of heights, colors, and seasonal interest that serves to soften and shade the site, and provide buffering and screening of the building and drive-thru; and
- The SIP meets Economic Development Goals ED-3.5 by developing a long time vacant commercial property that promotes reinvestment and infill development that efficiently utilizes existing infrastructure and resources.

(CastlePines-0800.) City staff also found that the SIP furthers the public health, safety, and welfare of the community because it provides a new business within walking distance of residential uses for the community to eat, work, and gather; a streetscape that enhances the walking experience; and develops a long-time vacant commercial property, which promotes reinvestment and infill development while efficiently utilizing existing infrastructure and resources. (CastlePines-0801.) Based on these findings, City staff recommended approval of the SIP. (CityPines-0801.)

*ii. City Council hears the presentation from the Applicants.*

The City Council held a public hearing on the SIP on May 28, 2024. (CastlePines-0004.) At the hearing, City staff, as well as representatives of Kimley-

Horn, McDonald's, and CP Commercial, including consultants and counsel (collectively, the "Applicants"), presented the SIP and related documents and explained why the SIP satisfies the Approval Standards. (*See* CastlePines-0756–89, 1447–80, 1499–1605.) The Applicants also explained, among other things, that a SIP that meets all of the technical requirements of the City's zoning requirements is compatible with the Comprehensive Plan because the zoning code requirements, by definition, implement the plan. (CastlePines-1501, 1561.)<sup>8</sup> In so doing, the Applicants reminded the City Council that the question before them is not whether the proposed use (*i.e.*, a fast-food restaurant) furthers the public health, safety, and welfare, but whether the SIP does so. (CastlePines-1565.)

The Applicants also described how a proposed large storage facility acts as a transitional buffer between the McDonald's and the neighboring residential area. (CastlePines-1454–56, 1548.) The City had previously approved a SIP for the storage facility, which, under Section 27, meant that it concluded that the storage facility complied with the Comprehensive Plan and its land use goal of ensuring that

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<sup>8</sup> The Applicants' presentation quoted from the Comprehensive Plan the statement that "[f]uture development may be viewed more positively as residents start to see the benefits and how additional tax revenue can provide for new amenities and infrastructure investment." (CastlePines-0783.) Indeed, the record contains a document describing the economic impact of a McDonald's and the economic driver its restaurants have been in Colorado. (CastlePines-1455–56.)

the building was compatible with the surrounding natural and built environment.

(*See generally* CastlePines-1746–1762.)

iii. *The traffic impact study explains that current proposed uses would result in less traffic.*

City staff and the Applicants also addressed traffic. They explained how a traffic impact study prepared for the SIP application (the “Traffic Study,” *see* CastlePines-0945–1023) compared with a prior traffic study prepared for the Lagae Family Trust Parcel, dated May 14, 2020 (the “Lagae Family Trust Parcel Traffic Impact Analysis”). (*See* CastlePines-1571–1575.) The City had previously accepted a revised version of the Lagae Family Trust Parcel Traffic Impact Analysis, which analyzed the total overall traffic for the entire planned development area, when it approved the Parkway Plaza PD. (CastlePines-1766.) The prior analysis was based on then-current assumptions that the development would include a recreation center, a city hall, and commercial retail. (CastlePines-1505.) Rick Engineering prepared the traffic studies utilizing methodology established by the Institute of Transportation Engineers (“ITE”) for trip generation. (CastlePines-1571.)

After comparing traffic generation from the uses in the Lagae Family Trust Parcel Traffic Impact Analysis with the Traffic Study’s uses, including fast-food restaurant use for the Property, Rick Engineering concluded that there would be *less* peak hour traffic (by approximately 869 daily trips) based on trip generation under



the current master development proposed uses than the previously-approved uses. (CastlePines-0945–52, 1467, 1556.) Thus, although Rick Engineering determined that the proposed McDonald’s would generate some traffic around the parcel, the current proposed uses for the planned development would nevertheless generate *less* peak hour traffic around the parcel than had previously been contemplated—and approved—by the City. (CastlePines-0776, 1467, 1594, 1597–98.)

The City Engineer also explained, in response to questions from councilmembers, that according to ITE the number of drive-thrus was not an independent variable affecting trip generation and that the ITE methodology and land uses used factored in the adjacent road network. (CastlePines-1513, 1525–28; *see also* CastlePines-1574–75 (engineering explanation that all intersections and other aspects of the road network were analyzed as part of the study).)

- iv. *The City Council’s public meeting drew considerable interest from the public regarding irrelevant issues and the proposed use.*

Public interest in the potential for a McDonald’s at that location in the City was significant. Approximately 100 citizens attended the public meeting, including 25 that commented. (*See generally* CastlePines-1485–1704.)

Nonetheless, most of the public comment and a majority of the City Council’s questions and comments centered on the proposed fast-food restaurant use or

preexisting issues, rather than the SIP itself. For example, residents and councilmembers expressed their concern that a McDonald's would increase crime on the theory that it would attract customers and employ people who are not City residents. (*See, e.g.*, CastlePines-1518, 1616, 1643–62.) In particular, one resident aired that McDonald's employees, who she referred to as “these people,” would be from outside the City because she did not believe that City residents would be willing to work at McDonald's and that travelers from Interstate-25 may try to sex traffic City children. (CastlePines-1664–65.) Residents also voiced concerns that McDonald's would be open 24 hours per day. (*See, e.g.*, CastlePines-1614, 1644, 1647, 1655, 1658.) In response, McDonald's' operator stated that although there is no applicable restriction on hours, the restaurant would adjust hours of operation based on demand following the restaurant's opening. (CastlePines-1577–78.)

Councilmembers parroted many of these same apprehensions. For example, Councilmember Deborah Mulvey raised a litany of concerns, many of which relate to the use of the property (*i.e.*, fast food), or were unrelated to whether the SIP met the Approval Standards, such as whether McDonald's planned to build an indoor or outdoor playground and whether McDonald's intended to install an advertising sign at the Interstate-25 exit. (CastlePines-1584.) Another councilmember, Roger Hudson, discussed traffic, crime, and 24-hour operation. (*See, e.g.*, CastlePines-

1518, 1576–78) Councilmember Hudson also asked why McDonald’s had scrapped plans for a patio. (CastlePines-1582–83.) The City Council, though, had learned that the SIP did not include plans for a patio because of its potential to attract non-customers to the location. (CastlePines-1583–84.)

As to traffic, numerous residents spoke about preexisting traffic related to a Montessori school in the area. (CastlePines-1613, 1631.) Councilmembers also focused on this topic, (CastlePines-1569–70), and also complained about cars that “queue” on Castle Pines Parkway—which abuts the parcel where the McDonald’s would go—and that additional traffic from development could aggravate this already-existing problem. (CastlePines-1569, 1592, 1695.)

v. *The Applicants’ rebuttal refocuses attention to the relevant issues.*

The Applicants’ counsel then rebutted two misconceptions that arose during public comment. (CastlePines-1665–72.) First, counsel explained that the SIP does not have to meet every one of the Comprehensive Plan’s goals and objectives to meet that Approval Standard. (CastlePines-1666–68 (noting that this criterion does not require a SIP to complete a checklist of every goal and objective).) Indeed, she explained, “there is never going to be a proposal that meets all of the goals in the Comprehensive Plan” because no proposal could “promote[] economic development

while establishing more parks and trails, while building more trees,” and so forth. (CastlePines-1667.)

Second, the Applicants’ counsel addressed the various traffic concerns raised by councilmembers and through public comment, including that the ITE trip generation manual should not be used as the source of establishing the methodology for analyzing traffic. (CastlePines-1667–70.) Counsel described that in her 30 years of experience, the ITE is “the definitive source for establishing the methodology” and that the City’s “rules say that that’s one of the methodologies that [the City] accepts for analyzing how the traffic should be measured for any given proposal.” (CastlePines-1668–69.) She further explained that two drive-thrus versus one does not affect trip generation because it simply manages the existing traffic more efficiently and minimizes the potential for stacking. (CastlePines-1669.) City staff determined that the Traffic Study met the City’s requirements. (CastlePines-1669–70.)

vi. Councilmembers’ deliberations wrongly focused on use.

After first entering into executive session to discuss whether the City Council could condition approval of the SIP on limiting operating hours, (CastlePines-1673–74), several councilmembers instead moved to deny the appeal. (CastlePines-1676.) Those in favor of denial made the following statements:

- Councilmember Chris Eubanks moved to deny the SIP because of concerns related to development exacerbating an existing traffic problem, including existing traffic related to the nearby school, and the possibility of increased crime. (CastlePines-1677–79.)
- Councilmember Roger Hudson explained that he was concerned with traffic and whether McDonald’s would affect the City’s status as a “walkable city.” (CastlePines-1669–81.)
- Councilmember Mulvey stated that she had did not have “any reason to question that [the second, third, and fourth approval criteria] are largely if not fully met,” but questioned whether the McDonald’s would further the “public health, safety, and welfare” of City residents. (CastlePines-1682.) Her main issue with the SIP, though, was that she was having trouble determining whether the McDonald’s would support the Comprehensive Plan’s goals and objectives. (*Id.*) She read from the Comprehensive Plan and highlighted various provisions that she believed conflicted with one another and the proposed fast-food restaurant use. (CastlePines-1682–84.) For example, she noted that while the plan specifically approves fast-food restaurants, it also encourages the development of “unique” and “high-end” restaurants. (CastlePines-1683.)<sup>9</sup>

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<sup>9</sup> Councilmember Mulvey spoke several more times. The first time, she noted that while the SIP may satisfy the Comprehensive Plan’s objectives, she believed that it conflicted with the City’s strategic plan. (CastlePines-1687.) City staff interjected, explaining that the councilmembers cannot consider whether the SIP conflicted with the strategic plan because it was outside the scope of the Approval Standards. (CastlePines-1687.) The second time, she focused on the proposed *use* and its potential for increased crime and traffic. (CastlePines-1694.) She stated that the traffic problems would not be solved by granting the SIP application so Council should deny it. (CastlePines-1695.) She then addressed aesthetics (*id.*), community input (CastlePines-1696), the building height (CastlePines-1697), the lack of a playground (*id.*), and pollution of idling cars (CastlePines-1698). Each of these factors either explicitly met the approval standards (aesthetics, height of the building), or were irrelevant to the City Council’s stated reasons for denial. She also voiced her disapproval of the traffic study’s findings, but admitted that the

- Councilmember Ron Cole also raised concerns about the potential for traffic around the McDonald's, as well as the possibility that people might order food through Uber Eats or Door Dash, thereby further aggravating the existing traffic problem. (CastlePines-1685.) He also questioned how McDonald's delivery trucks would be able to maneuver on the roads and in the McDonald's parking lot. (*Id.*)
- Mayor Pro Tem Ben Price stated he agreed with his fellow councilmembers' concerns, specifically citing Councilmember Hudson's reasoning. (CastlePines-1687.)

In contrast, Councilmember Geoff Blue stated that he favored approving the SIP and that he felt the other councilmembers were improperly scrutinizing design aspects of the McDonald's. (CastlePines-1686.) He further identified the Council's and community's potential biases, noting that he believed that if the plan was to build a Chick-fil-A—rather than a McDonald's—community opposition would have been minimal. (*Id.*) Mayor Tracy Engerman agreed with Councilmember Blue, noting that she believed the SIP had satisfied the requisite criteria. (CastlePines-1688.) While she agreed traffic is a concern at the proposed location, traffic had been—and would continue to be—a problem irrespective of whether a McDonald's is built, and she cautioned against denying the SIP on that basis because any future development in that area would increase traffic, regardless of its use. (CastlePines-

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data used was industry standard. (CastlePines-1698.) Lastly, she stated, without support, that employee parking was not accounted for in the traffic study. (*Id.*)

1688–89.) She also noted the chilling effect that penalizing the Applicants would have on future development in Castle Pines. (CastlePines-1688–90.)

vii. Councilmembers’ decision to deny the SIP was not supported by the evidence.

Ultimately, in contradiction to the City staff’s recommendation, the City Council denied the SIP in a 5-2 vote. (CastlePines-1702.) The adopted Resolution No. 24-39 (the “Resolution”) states that the City Council denied the SIP on two grounds: (1) the SIP’s purported failure to support the applicable goals and objectives of the Comprehensive Plan; and (2) that the SIP purportedly does not further the public health, safety, and welfare of the community. (CastlePines-1899–1902.)

As to the first ground, the Resolution cites “the public testimony, the nature of drive-thru use, and the lack of outdoor eating spaces.” (CastlePines-1900.) As to the second ground, the Resolution cites several perceived flaws with the commissioned Traffic Study:

- The traffic study is flawed in that it relies on 2011 data and doesn’t consider traffic from door dash and other food delivery services.
- While the traffic study relies on traffic engineering models, there should be additional consideration or rationale of the model in relation to actual driving patterns. As one Councilmember noted, the traffic study does not take into account that drivers will not travel all the way to the roundabout but will make a U-turn on Lagae Road in conflict with the shopping center across the street.

- Although the traffic study considers the road network, it doesn't consider the school uses surrounding the site which are relevant to traffic concerns and public safety.
- The traffic study also does not account for delivery trucks, fire trucks, and their ability to access the site.
- The traffic study does not account for employee parking.

(CastlePines-1901.) CP Commercial subsequently timely filed this appeal within 28 days of the City Council's decision pursuant to C.R.C.P. 106(a)(4).

### **STANDARD OF REVIEW**

Under C.R.C.P. 106(a)(4), the district court may review whether a decision-making body performing a quasi-judicial function “exceeded its jurisdiction or abused its discretion.” *Beaver Meadows v. Bd. of Comm’rs of Larimer Cnty.*, 709 P.2d 928, 938 n.8 (Colo. 1985). A governmental body abuses its discretion if it misinterprets or misapplies the law or if no competent record evidence supports its decision. *Save Our St. Vrain Valley v. Boulder Cnty. Bd. of Adjustment*, 491 P.3d 562, 571 (Colo. App. 2021); *No Laporte Gravel Corp. v. Bd. of Cnty. Comm’rs of Larimer Cnty.*, 507 P.3d 1053, 1060 (Colo. App. 2022).

A court may reverse the decision if it is devoid of competent evidence such that it is an arbitrary and capricious exercise of authority. *Ross v. Fire Police Pension Ass’n*, 713 P.2d 1304, 1309 (Colo. 1986). “[C]ompetent evidence is the same as substantial evidence.” *City of Colo. Springs v. Givan*, 897 P.2d 753, 756 (Colo.



1995). “Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. ‘It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’ . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” *Colo. Mun. League v. Mountain States Tel. & Tel. Co.*, 759 P.2d. 40, 44 (Colo. 1998).

## **ARGUMENT**

### **I. The City Council Abused Its Discretion in Denying the McDonald’s SIP.**

The City Council misapplied the law and did not rely upon any competent evidence in the record in denying the McDonald’s SIP based on the SIP’s supposed failure to comply with two criteria in the Approval Standards.<sup>10</sup> Specifically, the City Council misconstrued that it could deny the SIP based on the proposed fast-food restaurant use, failed to properly consider that the City had already approved the use under the Parkway Plaza PD, discounted that the traffic impact study utilized an approved methodology, and adopted a new traffic criteria that would improperly prohibit any development on the Property.

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<sup>10</sup> The City Council expressly did not deny the SIP based on other three criteria in the Approval Standards. (*See* CastlePines-1900.)

In so doing, the City Council did not heed the instruction in its own website, which provides:

The City must review land use applications based on the criteria of approval set forth in the Land Development Code and cannot base its decisions on subjective factors, such as brand preference or the type of user. Although some residents may not like a particular type of use, it is important to remember that the processes set forth in the Land Development Code are designed to balance the general health, safety, and welfare of the community with private property owners' rights to use their land as they deem appropriate. The City must treat everyone fairly and uniformly in its application of the Land Development Code.<sup>11</sup>

The City Council's reasons were pretextual and its denial of the SIP was an arbitrary and capricious decision to prevent a McDonald's from being built in that location.

**A. The City Council Cannot Deny the SIP for Reasons Related to the Proposed Fast-Food Restaurant Use.**

It is undisputed that the proposed McDonald's drive-thru restaurant is a fast-food establishment and therefore a use allowed by right. The recorded Parkway Plaza PD, which the City previously approved, lists "restaurant/ fast-food establishment" as a principal use for the property. (CastlePines-1763-65.)

The City has no basis to deny a SIP based on the proposed use. Once again, the City's own website is instructive:

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<sup>11</sup> City of Castle Pines, *Land Use Controls and Private Property Rights* (Nov. 11, 2024 3:00 PM), <https://www.castlepinesco.gov/land-use-controls-and-private-property-rights/>.

If the zoning accommodates the proposed land use, the City is obligated to support that land use, accept an application for development, and has no authority to determine the type of business or a preference of a specific business over another. Doing so would violate private property rights and subject the City to litigation.

The City Council, though, did exactly what was prohibited.

The Resolution first states that the SIP did not meet “the Comprehensive Plan’s goals of walkability, high quality development, and creating a sense of community,” “[a]s evidenced by the public testimony, the nature of drive-through use, and the lack of outdoor eating spaces.” (CastlePines-1900.) But these stated reasons in the Resolution for denying the SIP misconstrued the City’s Zoning Ordinances, specifically that the City Council reviews proposed SIPs under the Approval Standards in Paragraph 2703. The “applicable goals and objectives” of the Comprehensive Plan cannot include those pertaining to the proposed use.

First, the “nature of drive-through use” is explicitly a reference to the proposed use and an improper basis to deny the SIP. Drive-thrus are an ubiquitous feature of fast-food restaurants; the proposed McDonald’s is no different. The City Council previously approved the Parkway Plaza PD, which included “restaurant/fast-food establishment” as a principal use, as compliant with the Comprehensive Plan. (CastlePines-1721–22 (approval criteria), 1766–67 (ordinance approving planned development.) If the City Council believes that “drive-through

use” is inconsistent with the plan, then it never should have approved “restaurant/fast-food establishment” as a principal use for the Property. It cannot use that reason for denial now.

Second, and similarly, the reference to “lack of outdoor eating spaces” pertains to the Property’s proposed use. Fast-food restaurants, by nature, do not have significant, if any, outdoor spaces for eating. And, in this instance, the SIP does not propose outdoor seating for a legitimate reason to specifically address one of City Council’s concerns—potential to attract non-customers to the location. (CastlePines-1583–84.)

Third, “high quality development” likewise refers to nature of the proposed use. Economic Development Goal 1.4, which was *not* cited in the Resolution, states that to “[f]oster a robust and resilient economy and workforce,” the City should “[c]ontinue consistent, high-quality development that visually bridges the existing and new areas of the City.” (CastlePines-1804.) The City Council did not find that the SIP proposed a low quality design that did not meet the requirements. Indeed, both City staff and the Applicants presented details on the materials to be used and why the landscaping was consistent with the surrounding area, (CastlePines-1432, 1460–64, 1502–03), and City staff noted in its presentation that the SIP “complies with the mixed use design guidelines by using high quality building materials in a

complementary color palette that offers roof plane changes, a combination of vertical and horizontal architectural treatments . . . that are aesthetically pleasing.” (CastlePines-1509.) The Resolution also states that the SIP complies with the third and fourth Approval Standards, which address compliance with design guidelines, technical standards and requirements. (CastlePines-1901.) Rather, the reference to “high quality development” must be read as a slight against fast-food restaurants as “lower quality” restaurants.

Fourth, many of the councilmembers’ comments in support of denial mirrored the public’s complaints about the proposed *use*. As detailed above, the public testimony included statements that:

- a McDonald’s would increase crime<sup>12</sup> in Castle Pines because it would attract customers who are not Castle Pines residents, and it would employ people who are not Castle Pines residents, (*see, e.g.*, CastlePines-1518, 1616, 1643–62.);
- the restaurant did not comply with the Comprehensive Plan because it would not be making healthy food, (CastlePines-1645);
- a McDonald’s is not a “unique” or “high-end” restaurant, (CastlePines-1683);
- the restaurant would affect the City’s status as a “walkable city,” (CastlePines-1669–81); and

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<sup>12</sup> As City staff explained at the public meeting, “[c]rime is . . . not a site improvement plan approval criteria and the Douglas County Sheriff’s Office has oversight of this issue.” (CastlePines-1507.)

- there would be pollution from idling cars, (CastlePines-1698).

None of these reasons pertain to the SIP; they all address fast-food restaurant use. Therefore, the City Council improperly denied the SIP under the first Approval Standard.

The Resolution also states that the City Council denied the SIP on the basis that it does not “further[] the public health, safety and welfare of the community.” (CastlePines-1901.) To the extent it did so based on the proposed use, that is also improper. For example, the City may attempt to argue that the SIP should be denied because fast-food restaurants make unhealthy food and usually include drive-thrus that encourage car use. But CP Commercial has the right to develop the Property for fast-food establishment use.

Further, the Resolution cites to various “traffic” concerns under the health, safety, and welfare criterion. But, to the extent the City argues that the City Council could deny the SIP on the basis that a McDonald’s or fast-food restaurant use will inherently cause certain traffic problems, those arguments must be disregarded as well. For example, the public testimony included statements like those from Councilmember Cole, who voiced concerns about how McDonald’s delivery trucks would be able to maneuver on the roads and in the parking lot. (CastlePines-1685.)

These concerns pertain to the use of the Property and the previously approved planned development.

Simply put, the City Council cannot deny a SIP for reasons inherent to the proposed use because that it outside the scope of the council's review.

**B. The City Council's Stated Reasons for Denying the SIP under the Comprehensive Plan Approval Standard Overlook the Scope of Its Review and Its Prior Determinations.**

Even if the City Council's reasons for denying the SIP on the basis that it did not further the applicable goals and objectives of the Comprehensive Plan do not all pertain to the proposed fast-food restaurant use, the council nevertheless (1) misconstrued the scope of its review by requiring that every goal and objective be met; (2) made a decision that conflicts with its prior approval of the adjacent storage facility; and (3) failed to consider that it had already determined that the Parkway Plaza PD, where the Property is located, met the applicable goals and objectives in the Comprehensive Plan.

As the Applicants explained at the City Council's public meeting, the first Approval Standard, by its very terms, does not require that the SIP comply with every goal and objective in the Comprehensive Plan. (CastlePines-1666–68.) No proposal could possibly meet the often conflicting goals and objectives, which is why this approval standard does not require that a SIP check off that it furthers each

one. (*Id.*) Even Councilmember Mulvey, who voted to deny the SIP, acknowledged that the goals and objective often conflict. (CastlePines-1682–84 (noting that the plan “says a pro-business environment[] conducive to attracting a variety of retail restaurants, service, grocery options, support and cultivate local businesses, and increase business retention”).) It contains, for example, potentially conflicting references to both high-end restaurants and fast-food restaurants. (*See, e.g.*, CastlePines-1873.) Yet, despite this, the City Council fell into the trap. Not only does the Resolution’s reference to “lack of outdoor eating spaces” refer to the proposed use, it also improperly requires that the SIP comply with every conceivable aspect of every single development goal. (CastlePines-1900.)

The councilmembers should have recognized that this approval standard instead provides that the SIP should “support[] the goals and objectives of the City of Castle Pines Comprehensive Plan.” (CastlePines-1747.) As noted in the City staff recommendation, the SIP clearly satisfies several of the plan’s goals and objectives, including the goal to “promote reinvestment, redevelopment, and adaptive reuse of under-performing or vacant commercial properties by developing a long time vacant commercial properties” because the Parkway Plaza PD is currently vacant. (CastlePines-0109, 1805.) The councilmembers’ decision to cherry-pick several goals and objectives is arbitrary and capricious.



As further illustration, the cited goals of “walkability, high quality development, and creating a sense of community” did not prevent the City Council from approving an SIP for a self-storage facility on the adjacent property. (*See* CastlePines-1502, 1548–49.) The approved self-storage facility acts as a buffer between the proposed McDonald’s and residential areas. (CastlePines-1454–56, 1548, 1566.) If a self-storage facility supports the Comprehensive Plan’s goals and objectives, despite the economic goal of “enhance[ing] pedestrian circulation that connects commercial centers to residential neighborhoods” and the land use goal of ensuring that the building was compatible with the surrounding natural and built environment, then surely a McDonald’s does, too. *See Canyon Area Residents for the Env’t v. Bd. of Cnty. Comm’rs of Jefferson Cnty.*, 172 P.3d 905, 910 (Colo. App. 2006) (explaining that where a local government’s interpretation and application of its land use code is not uniform or consistent, courts do not extend deference to its legal interpretations). The self-storage facility’s SIP approval highlights that a SIP does not have to meet every goal and objective.

Importantly, the City Council’s decision to deny the SIP on this ground utterly ignored that the City had approved the Parkway Plaza PD only a year earlier. As part of that approval, the City necessarily determined that the planned development, which includes the Property and the self-storage facility, and the permitted uses for

it, complied with the Comprehensive Plan because that is one of the applicable approval criteria for a development plan. (See CastlePines-1721–22 (development plan approval criteria), 1763–71 (recorded plan and ordinance approving plan).) Because the City had previously found that the planned development complied with the Comprehensive Plan and that the SIP met the requirements of that planned development and the technical site improvement plan requirements (*i.e.*, the second, third, and fourth Approval Standards), it logically follows that the McDonald’s SIP supports the Comprehensive Plan.

C. **The City Council’s Decision to Deny the Site Plan on the Basis of Health, Safety, and Welfare Is Contrary to the Planned Development’s Prior Approval.**

The City Council’s second reason to deny the SIP was that it did not further public health, safety, and welfare because of purported shortcomings in the Traffic Study. (CastlePines-1901.) In addition to other flaws, this rationale ignores that the City, in approving the Parkway Plaza PD, already accepted a prior version of the traffic study that projected *more* traffic for that development than the projected traffic for the current uses, and determined that the development plan furthered the public health, safety, and welfare. The City Council’s denial contradicts those earlier determinations.

The earlier traffic study for the Parkway Plaza PD used ITE methodology to determine the peak trip generation for the development's proposed uses—methodology approved by the City per its code because it complies with Douglas County's Traffic Impact Study Criteria. (*See* CastlePines-1435–38, 1465–67.) The City approved the planned development with this traffic study, and, in so doing, specifically stated that the planned development plan “further[s] the public health, safety, convenience and general welfare of the community and meet[s] the criteria of approval set forth in Section 15 of the Zoning Ordinance.” (CastlePines-1766–67.) “[W]hether the intended land use would create traffic congestion or burden the existing road network” is one of the approval criteria for planned development rezoning. (CastlePines-1721.)

One year later, the Applicants submitted the SIP for a McDonald's with an updated study—the Traffic Study. (CastlePines-0945–1023.) This study again used the ITE methodology to measure peak hour trip generation for the planned development—this time with updated proposed uses, including the McDonald's and the previously-approved self-storage facility. (*Id.*; CastlePines-1467.) Like with the criteria for planned developments, the Approval Standards require that SIPs comply with the City's technical standards and requirements, including the City's Roadway Design & Construction Standards Manual. The ITE methodology is approved under

that manual. And, the Traffic Study showed that that peak hour trip generation would be *less* with the new proposed uses. (CastlePines-0776, 0945–52, 1467, 1556, 1594, 1597–98.)

Therefore, the City Council’s decision to deny the McDonald’s SIP on this ground is contrary to its prior decision that the planned development, including the prior traffic study, furthered the health, safety, and welfare of the community. Indeed, the Resolution cites to numerous perceived issues with the traffic study’s consideration of the surrounding road network, despite previously determining that the planned development would not “burden the existing road network.” (CastlePines-1721, 1901.) The City cannot accept a planned development with a traffic study specifying a certain amount of peak hour trip generation for certain uses and then subsequently reject a SIP for one of the parcels in that planned development on the basis that the traffic runs afoul of the health, safety, and welfare of the community when the Traffic Study concludes that peak hour trip generation would be *less* for the new proposed mix of uses. This is especially true because the City approves of the ITE methodology utilized in both studies as meeting the necessary requirements. The City Council’s denial was thus arbitrary and capricious.

**D. The City Council Analyzed Traffic under the Wrong Approval Standard.**

The City Council's error is compounded by the fact that it analyzed the Traffic Study under the health, safety, and welfare Approval Standard, and not the fourth Approval Standard, which addresses compliance with technical standards and requirements, such as the "Traffic Impact Study Criteria" within the City of Castle Pines Roadway Design & Construction Standards. (*See* CastlePines-1747.) As City staff explained at the public meeting, "[t]raffic is covered by our Roadway Design and Construction Design Standards Manual and reviewed for traffic impacts and mitigations at the time of the site improvement plan." (CastlePines-1507.) The Traffic Impact Study Criteria specifies, for example, that the study should include "a summary table listing type, size, the Institute of Transportation Engineers (ITE) Trip Generation – Land Use Code for each land use in the development, trip generation rates, and the resultant total trips for each analysis time period."<sup>13</sup>

The City Council did not identify any requirement within the "Traffic Impact Study Criteria" that was not met. Rather, it conjured new requirements under its reasons why the SIP did not comply with the fifth Approval Standard, including that the study should explicitly cover "traffic from door dash and other food delivery

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<sup>13</sup> Roadway Design and Construction Standards, at 6-5.

services,” “school uses surrounding the site,” “delivery trucks, fire trucks and their ability to access the site,” and “employee parking.” None of these are explicit requirements under the Traffic Impact Study Criteria. (CastlePines-1901.) In fact, the parking standards for drive-in restaurants are found in Paragraph 2807.32 of the City’s Zoning Ordinances, a separate code section. The SIP meets the parking requirements by providing 38 parking spaces and 18 stacking spaces. (CastlePines-0107.)

City staff recommended that the SIP meets the fourth Approval Standard because “[i]t complies with the City’s design and construction standards for roads, storm drainage, grading, and erosion and sediment control.” (CastlePines-0110.) The City Council agreed in the Resolution that this standard had been met. (CastlePines-1901.) Because of that, the City Council cannot turn around and deny the SIP under a different standard inapplicable to its review of the Traffic Study.

**E. The City Council’s Decision Creates New Traffic Standards Contrary to the City’s Code.**

The City Council also impermissibly created new traffic standards for SIP approval in denying the SIP based on the submitted Traffic Study.

First, as described above, the Resolution explicitly creates new technical standards found nowhere in the Traffic Impact Study Criteria under the guise of health, safety, and welfare. In doing so, the City Council is essentially requiring

applicants to anticipate which unwritten technical standards it might require and include that in traffic study submittal, even if the traffic study uses a definitive and accepted source for trip generation (CastlePines-1668–69.) For example, the City Council’s “second reason” why the SIP (and the traffic study) does not further the health, safety, and welfare of the community stated that “[w]hile the traffic study relies on traffic engineering models, there should be additional consideration or rationale of the model in relation to actual driving patterns . . . .” (CastlePines-1901.) Setting aside that the Traffic Study did, in fact, consider the existing road network, (*see* CastlePines-1525–27, 1574–75), these additional considerations are absent from the City’s code and thus are the very definition of arbitrary.

Second, although not explicitly stated in the Resolution (but underlying the stated reasons for denial), multiple councilmembers cited that a McDonald’s would add traffic to a preexisting traffic problem on the nearby Castle Pines Parkway as a reason to deny the SIP. (CastlePines-1569–70, 1592–94, 1679–81.) The preexisting traffic problem on nearby roads, by its nature, pre-dates the SIP and thus is no reason for denial. (*Id.*) As already described *supra*, the City had determined only one year earlier that the Parkway Plaza PD met the approval criteria, despite one of the criteria asking “whether the intended land use would create traffic congestion or burden the

existing road network.” (CastlePines-1721, 1766–67.) The City Council cannot deny a SIP because it does not alleviate an existing traffic problem on nearby roads.

Rather, the City Council appears to be instituting a new approval standard—one that would allow it to deny any new SIP if the planned development would increase traffic at all when there is a preexisting traffic problem with the adjoining road network. (See CastlePines-1599–1602 (dialogue at the public meeting that any development will create more traffic, regardless of whether it is a McDonald’s).) As Mayor Engerman cautioned during the public meeting, “any of these parcels is going to have the exact same concern,” and “we’re going to be right back here if another applicant, regardless of whether it’s fast food or it’s a restaurant, about the safety and concern for the int- -- intersection that’s coming out of this area.” (CastlePines-1688 (stating that “to penalize the current applicant, I don’t think is correct”).) Indeed, not only is this a new (and improper) approval standard outside of the City’s code, but it would come dangerously close to allowing the City Council to take private property absent compensation, if not constitute an improper taking.<sup>14</sup>

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<sup>14</sup> See *Forest View Co. v. Town of Monument*, 464 P.3d 774, 779 (Colo. 2020) (“A regulatory taking occurs when a government entity does not physically occupy the land, but government action places an impermissible burden on certain landowners, effectively forcing some people alone to bear public burdens that, in fairness and justice, should be borne by the public as a whole.” (internal quotations omitted)).



**F. No Competent Evidence Supports the SIP's Denial.**

In addition to the reasons why the City Council misapplied its code and did not factor in the prior approval of the Parkway Plaza PD, the City Council's stated reasons for denying the SIP lack any competent evidence in support. "[C]ompetent evidence is the same as substantial evidence." *Givan*, 897 P.2d at 756. "Substantial evidence is more than a scintilla, and . . . '[i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. . . ." *Colo. Mun. League*, 759 P.2d. at 44 (internal citations omitted).

As to the first standard on supporting the Comprehensive Plan's goals and objectives, there is no competent evidence in the record that the SIP does not further the three goals identified in the Resolution (to the extent they even apply):

- Economic Development Goal 2.3 - Enhance pedestrian circulation that connects commercial centers to residential neighborhoods
- Land Use Goal 2.1 - Use design techniques and land use elements to create a sense of community identity.
- Land Use Goal 2.2 Ensure non-residential building design, scale, and orientation are compatible with the surrounding natural and built environment.

(CastlePines-1900.) To the contrary, the evidence in the record is that the SIP includes quality design, materials, and landscaping. (*See, e.g., supra* § I.A; CastlePines-1503 (City staff describing the materials "contribute to a balanced visual

aesthetic”), 1509 (landscaping provides buffering and screening); 1686 (Commissioner Blue stating that “[t]hey met the criteria” and “I think it’s actually a fairly attractive building”).) The same is true as to walkability. The undisputed evidence was that “there is access to the McDonald’s property from Castle Pines Parkway up a sidewalk that goes along the east side of the private drive.” (CastlePines-1583; *see also* CastlePines-1510 (City staff describing it is “within walking distance of residential and a streetscape which enhances the walking experience”); 1694 (Councilmember Mulvey stating that “this will enhance walking”).) Even though the McDonald’s would provide the convenience of a drive-thru, the SIP allows for pedestrians to access the Property via a sidewalk.

As to the public health, safety, and welfare standard, the Resolution echoes misconceptions and incorrect statements from public comments regarding the Traffic Study and cites to no evidence that the underlying ITE methodology was flawed. City staff had already accepted the Traffic Study as meeting all its requirements and did not raise the alleged flaws during the months-long review and referral process for the SIP (CastlePines-0799). Certain councilmembers simply did not agree with it or refused to accept it.

First, the Resolution’s statement that the Traffic Study is flawed because it relies upon 2011 data repeats unsupported public comments, (*see, e.g.*, CastlePines-

1611, 1627, 1659), and is simply false. There is nothing in the record showing that the Traffic Study itself relied upon 2011 data. Rather, the Traffic Study expressly states that it used the 11th edition of the ITE's Trip Generation publication, which was published in 2021, as a source. (CastlePines-0945–1023.) The 11th edition necessarily incorporates data since its prior publication in 2017. Further, use of the latest ITE publication for trip generation rates, which is exactly what the Traffic Study did, is required under Paragraph 6.2.5 of the City's Roadway Design and Construction Standards. Even Councilmember Mulvey admitted that the Traffic Study is based on industry standard methodology. (CastlePines-1698.)

Second, as to traffic from food delivery services, delivery trucks, and other vehicles, the Traffic Study used the latest approved ITE methodology, including a trip generation standard that was applied to the land use. (CastlePines-1597.) Paragraph 6.2.5 of the City's Roadway Design and Construction Standards requires that traffic impact studies include trip generation rates based on the ITE Land Use Codes. The Traffic Study used the Fast-Food Restaurant with Drive-Through Window code (Land Use 932). (CastlePines-0945, 0975–77.) It then generated the number of trips using that code. (CastlePines-0945–46.) Thus, the ITE Land Use Code utilized addressed the relevant considerations, such as traffic from food

delivery services, delivery trucks, and fire trucks, all of which were present at the time of the latest edition of the ITE's Trip Generation publication.

Third, as described above, the Traffic Study considered the road network, including intersections and other aspects. (CastlePines-1513, 1525–28, 1574–75.) The Traffic Study itself describes how it addressed the adjacent street system, and includes detailed tables and calculations. (CastlePines-0945–1023.) And, contrary to the statement that the Traffic Study “d[idn]’t consider the school uses surrounding the site,” the Traffic Study factored traffic related to nearby schools during the identified peak traffic hours. (CastlePines-1525, 1571–72 (explaining that “traffic counts and the intersection movement counts were all collected during the peak hour during the school . . . timeframe”).)

Fourth, the Resolution misrepresents the record as to driving patterns. Not only does the Resolution fail to mention that specific traffic concerns identified by City Council and residents, such as U-turns and accidents, were already present, (CastlePines-1573, 1569–70, 1592, 1695), but, contrary to the statement in the Resolution, the Traffic Study analyzed U-turns, relevant intersections, and queuing that occurs in those intersections in all directions. (CastlePines-1574–75.) The traffic engineer explained, in response to councilmembers’ questions, that the intersections already operate at a certain level without the project and, for the troubling identified

intersections, “there’s no mitigation measures that can make it any better.” (*Id.*) Instead, the Resolution appears to be impermissibly requiring that the SIP remedy existing traffic issues to meet the safety approval standard.

And fifth, as described *supra* § I.D, employee parking is outside a traffic study’s purview and addressed under a different part of the City’s code. Indisputably, the SIP contains the required number of parking spaces. (CastlePines-0107.)

Therefore, even if the City Council had not misapplied its code or properly factored in the planned development’s approval, a reasonable mind would not accept the evidence in the record as adequate to support the council’s decision that the SIP did not meet the Approval Standards.

### **CONCLUSION**

Because the City Council abused its discretion and exercised its authority arbitrarily and capriciously, CP Commercial respectfully requests that this Court vacate and reverse the City Council’s decision to deny the site improvement plan for a McDonald’s, remand back to the City Council with instructions that the City Council must grant the site improvement plan, and award other relief that this Court deems just and proper.

Respectfully submitted this 13th day of November, 2024.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
J. Maxwell Porteus, #56405  
Alexander P. Jack, #60682

*Attorneys for Plaintiff CP Commercial, LLC*

## **CERTIFICATE OF SERVICE**

I hereby certify that on November 13, 2024, I electronically filed a true and correct copy of the foregoing **PLAINTIFF'S OPENING BRIEF** with the Clerk via Colorado Courts E-Filing which will send notification and service upon the following:

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*Attorneys for Proposed Intervenor for The Castle Pines North  
Homeowners Association No. 1*

s/ Kate M. Meade  
Kate M. Meade, Paralegal

31706521

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED October 28, 2024 7:33 AM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>PLAINTIFF’S SECOND UNOPPOSED MOTION FOR EXTENSION OF TIME OF BRIEFING SCHEDULE</b></p>	

Plaintiff CP Commercial, LLC (“CP Commercial”), through undersigned counsel, hereby requests a second extension of time of the current briefing schedule and in support states as follows:

**CERTIFICATE OF CONFERRAL UNDER C.R.C.P. 121 § 1-15(8)**

Undersigned counsel certifies that they have conferred with counsel for Defendant City Council for the City of Castle Pines, Colorado (“City Council”) regarding the relief requested in



this motion. City Council does not oppose the relief requested herein.

1. C.R.C.P. 106(a)(4)(VII) provides that the plaintiff shall file, and serve on all parties, an opening brief within 42 days after the date on which the record was filed . . . . The defendant may file and serve an answer brief within 35 days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within 14 days after service of the answer brief.

2. The record was filed on August 19, 2024.

3. Plaintiff's Opening Brief was originally due on September 30, 2024.

4. Plaintiff filed its Unopposed Motion for Extension of Time of Briefing Schedule on September 26, 2024, requesting an extension of its Opening Brief to October 30, 2024. The Court granted the request on September 29, 2024.

5. The parties have conferred and agree that an additional 14-day extension of time of the briefing schedule is warranted extending the deadline for Plaintiff to file its Opening Brief to November 13, 2024, with Defendant's Answer Brief due 35 days after service of Plaintiff's Opening Brief, and Plaintiff's Reply Brief due 14 days after service of Defendant's Answer Brief.

6. Good cause exists to grant this motion. *First*, The Castle Pines North Homeowners Association, No. 1's ("HOA") Motion to Intervene ("Motion to Intervene") was filed on August 21, 2024, and the issue was fully briefed on September 18, 2024. The parties continue to believe that it is in their best interests and in the interest of judicial economy to wait to brief this action until the Court rules on the Motion to Intervene. *Second*, the parties are continuing to discuss whether there may need to be amendments to the record and the impact of

certain code provisions on development applications. They need additional time to confer on these issues and believe a resolution is close at hand.

7. This unopposed request is made in good faith and is based on a genuine need for an extension of time of the current briefing schedule.

8. The requested extension of time will neither unduly delay the proceedings nor prejudice the parties.

9. In compliance with C.R.C.P. 121 § 1-11, a copy of this motion has been served upon the Plaintiff.

WHEREFORE, Plaintiff respectfully requests that the briefing schedule be extended by 14-days with Plaintiff's Opening Brief due on November 13, 2024, Defendant's Answer Brief due 35 days after service of Plaintiff's Opening Brief, and Plaintiff's Reply Brief due 14 days after service of Defendant's Answer Brief.

Respectfully submitted this 28th day of October, 2024.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke

Carolynne C. White, #23437

David B. Meschke, #47728

J. Maxwell Porteus, #56405

*Attorneys for Plaintiff CP Commercial, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of October, 2024, I electronically filed a true and correct copy of the foregoing **PLAINTIFF'S SECOND UNOPPOSED MOTION FOR EXTENSION OF TIME OF BRIEFING SCHEDULE** with the Clerk via Colorado Courts E-Filing which will send notification and service upon the following:

Josh A. Marks  
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Homeowners Association No. 1*

s/ Kate M. Meade  
Kate M. Meade, Paralegal

31638373

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED October 28, 2024 7:33 AM          ▲ COURT USE ONLY ▲
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	
	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>ORDER GRANTING PLAINTIFF’S SECOND UNOPPOSED MOTION FOR EXTENSION OF TIME OF BRIEFING SCHEDULE</b></p>	

THIS MATTER comes before the Court on Plaintiff’s Second Unopposed Motion for Extension of Time of Briefing Schedule (“Motion”).

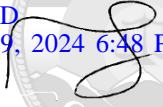
The Court, having reviewed the Motion and being otherwise fully advised in the matter, hereby GRANTS the Motion and ORDERS that Plaintiff’s shall file its Opening Brief on November 13, 2024, Defendant’s Answer Brief is due 35 days after service of Plaintiff’s Opening Brief, and Plaintiff’s Reply Brief is due 14 days after service of Defendant’s Answer Brief.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2024.

BY THE COURT

\_\_\_\_\_  
 District Court Judge

**GRANTED BY COURT**  
**09/29/2024**

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED September 29, 2024 6:48 PM  <b>ROBERT RAYMOND LUNG</b> District Court Judge
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
	Case Number: 2024CV030582  Div.: 6
<b>ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR EXTENSION OF TIME OF BRIEFING SCHEDULE</b>	

THIS MATTER comes before the Court on Plaintiff's Unopposed Motion for Extension of Time of Briefing Schedule ("Motion").

The Court, having reviewed the Motion and being otherwise fully advised in the matter, hereby GRANTS the Motion and ORDERS that Plaintiff's shall file its Opening Brief on October 30, 2024, Defendant's Answer Brief is due 35 days after service of Plaintiff's Opening Brief, and Plaintiff's Reply Brief is due 14 days after service of Defendant's Answer Brief.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2024.

BY THE COURT

\_\_\_\_\_  
District Court Judge

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED September 26, 2024 2:21 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>PLAINTIFF’S UNOPPOSED MOTION FOR EXTENSION OF TIME OF BRIEFING SCHEDULE</b></p>	

Plaintiff CP Commercial, LLC (“CP Commercial”), through undersigned counsel, hereby requests an extension of time of the current briefing schedule and in support states as follows:

**CERTIFICATE OF CONFERRAL UNDER C.R.C.P. 121 § 1-15(8)**

Undersigned counsel certifies that they have conferred with counsel for Defendant City Council for the City of Castle Pines, Colorado (“City Council”) regarding the relief requested in this motion. City Council does not oppose the relief requested herein.

1. C.R.C.P. 106(a)(4)(VII) provides that the plaintiff shall file, and serve on all parties, an opening brief within 42 days after the date on which the record was filed . . . . The defendant may file and serve an answer brief within 35 days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within 14 days after service of the answer brief.

2. The record was filed on August 19, 2024.

3. Plaintiff's Opening Brief is currently due on September 30, 2024.

4. The parties have conferred and agree that a 30-day extension of time of the briefing schedule is warranted extending the deadline for Plaintiff to file its opening brief to October 30, 2024, with Defendant's Answer Brief due 35 days after service of Plaintiff's Opening Brief, and Plaintiff's Reply Brief due 14 days after service of Defendant's Answer Brief.

5. Good cause exists to grant this motion. *First*, The Castle Pines North Homeowners Association, No. 1's ("HOA") Motion to Intervene ("Motion to Intervene") was filed on August 21, 2024, and the issue was fully briefed on September 18, 2024. The parties believe that it is in their best interests and in the interest of judicial economy to wait to brief this action until the Court rules on the Motion to Intervene. *Second*, the parties are discussing whether there may need to be amendments to the record and need additional time to confer on this issue.

6. This unopposed request is made in good faith and is based on a genuine need for an extension of time of the current briefing schedule.

7. The requested extension of time will neither unduly delay the proceedings nor prejudice the parties.

8. In compliance with C.R.C.P. 121 § 1-11, a copy of this motion has been served upon the Plaintiff.

WHEREFORE, Plaintiff respectfully requests that the briefing schedule be extended by 30-days with Plaintiff's Opening Brief due on October 30, 2024, Defendant's Answer Brief due 35 days after service of Plaintiff's Opening Brief, and Plaintiff's Reply Brief due 14 days after service of Defendant's Answer Brief.

Respectfully submitted this 26th day of September, 2024.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
J. Maxwell Porteus, #56405

*Attorneys for Plaintiff CP Commercial, LLC*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of September, 2024, I electronically filed a true and correct copy of the foregoing **PLAINTIFF'S UNOPPOSED MOTION FOR EXTENSION OF TIME OF BRIEFING SCHEDULE** with the Clerk via Colorado Courts E-Filing which will send notification and service upon the following:

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Homeowners Association No. 1*

s/ Kate M. Meade  
Kate M. Meade, Paralegal

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CPC's response essentially argues that because the property's current zoning allows for fast-food restaurant use, CPC is permitted to build-out the site in derogation of multiple Sections of the City of Castle Pines Comprehensive Plan while completely ignoring the Association's valid concerns and objections. This is an astounding proposition.

CPC seeks to exclude the party which will be most impacted by the site improvement plan ("SIP") application from these proceedings so that it can impair the Association's interest without it being present to defend it. This is contrary to both C.R.C.P. 24 and 19, applicable case law, and basic principles of equity.

## **II. LEGAL STANDARD**

C.R.C.P. 24(a)(2) allows a party to timely intervene as a matter of right when (1) the applicant claims an interest relating to the subject matter of the litigation; (2) disposition of the action may impair or impede the applicant's ability to protect that interest; and (3) the applicant's interest is not adequately represented by existing parties.

C.R.C.P. 24(b) provides that upon timely application anyone may be permitted to permissively intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common.

"[T]he goal of intervention is to consolidate related issues into the same lawsuit. *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 404 (Colo. 2011). It is well established in Colorado that "Rule 24 should be interpreted liberally," *Feigin v. Alexa Grp.*, 19 P.3d 23, 26 (Colo. 2001). Absent an abuse of discretion, a trial court's ruling on intervention will not be disturbed on appeal. *Tekai Corp. v. Transamerica Title Ins. Co.*, 39 Colo.App. 528, 571 P.2d 321 (1977).

### III. ARGUMENT

#### A. INTERVENTION AS A MATTER OF RIGHT

##### 1. Interest

Colorado adopts a “flexible approach to determining whether a person possesses an interest in intervening under Rule 24(a)(2),” and rigid standards are unpersuasive. The existence of an interest under Colorado's Rule 24(a)(2) should be determined in a liberal manner rather than formalistically. *Feigin, supra*, at 29, citing *O'Hara Group Denver v. Marcor Housing Systems*, 595 P. 2d at 687, 197 Colo. at 541, 595 P.2d at 687.

As noted above, CPC concedes that the Association's application was timely and that the Association is an immediate, contiguous neighbor to the Plaintiff's 1.3-acre property. CPC cites zero case law holding or even suggesting that an immediate, contiguous neighbor to an appellant of an adverse site improvement plan determination lacks an interest sufficient to intervene. Instead, CPC argues for artificially narrow interpretations of the case law cited by the Association.

CPC argues that “there is no zoning order at issue here, so the HOA's reliance on *Roosevelt* is misplaced.”<sup>1</sup> This misstates *Roosevelt v. Beau Monde Co.*, which held that “the development and growth of a comprehensively zoned area in accordance with the uses permitted under the plan does not permit emasculation of such plan.” *Id.*, at 575, citing *Clark v. Boulder*, 146 Colo. 526 at 532 (Colo. 1961). *Roosevelt* is entirely on point and fully supports the Association's intervention in this proceeding.

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<sup>1</sup> While all SIPs involve zoning, all zoning does not involve SIPs. Section 27 of the City of Castle Pines *Zoning Ordinance* addresses site improvement plans, e.g. Section 2701 - The Site Improvement Plan (SIP) process is required to ensure development will be consistent with the Comprehensive Plan, Subdivision Ordinance, and *Zoning Ordinance*, and all applicable federal, State, and local standards (italics supplied).

CPC similarly criticizes *Rangeview, LLC v. City of Aurora*, 381 P.3d 445, 459 (Colo. App. 2016) as merely a “rezoning” case. Not so. “Rangeview appeals the district court's decision, arguing that City Council abused its discretion by (1) approving the site plan when the plan did not include an outdoor gathering space that meets SIR design standards...” *Id.*, at ¶ 6. *Rangeview* is also not about standing generally, but rather standing in relation to a party’s injury and thus its ability to pursue or intervene in a Rule 106(a)(4) appeal such as this. *Id.*, at ¶ 12 (In evaluating the evidence presented of deleterious effects of a proposed site plan, “we conclude that the record supports a showing of an injury-in-fact, that Rangeview had standing, and that the trial court had jurisdiction to adjudicate the claims before it.”)

The Association has more than adequately articulated and established a sufficient interest to permit intervention in this matter, particularly under Colorado’s flexible and liberal standards.

## **2. Impairment of interest**

Here, CPC merely reiterates its misplaced “zoning” arguments in this section of its response, which is addressed above. Other than claims of vagueness, CPC does not refute or adequately address the Association’s claims relating to nuisance and diminution in value. Moreover, it is not the Association’s burden to prove each element of its claims at the pleading stage nor in its motion to intervene. C.R.C.P. 24(c). The Association is only required to state the grounds and facts upon which it seeks intervention, together with an answer identifying asserting its defenses. *Weston v. Ts&sT, LLC*, 271 P.3d 552, 556 (Colo. App. 2011). The Association’s proposed answer sets forth cognizable and viable affirmative defenses to CPC’s complaint.

The Association has identified numerous specific instances in which CPC’s proposed SIP would both impair its interest and violate the Castle Pines Comprehensive Plan, including but not

limited to, Comprehensive Plan Sections: ED-2.2, ED-2.3, T-2.3, T-3, T-5, H-1.2, LU-5.1, and LU-8.1. These Sections address the SIP and buildout proposals of CPC, *not* rezoning, CPC's repeated and insistent straw man arguments notwithstanding. These Sections address the proposed double bay drive-through, traffic, pedestrian and bicycle connectivity, traffic, noise, air and light pollution, litter, and other public safety issues and concerns.

CPC's argument in response is that the City has already approved its property zoning to allow fast-food restaurant use. This is not disputed. However, the City has not approved and in fact has rejected its proposed SIP due to CPC's failure to address the requirements of a SIP application and the valid concerns associated with the Sections cited above. There is certainly a way to responsibly build out a fast-food restaurant in this location which would comply with the Comprehensive Plan. Unfortunately, CPC has not embraced this approach.

### **3. Interest not adequately represented by existing parties**

CPC doubles down here, arguing that the "HOA's alleged interest is adequately represented, which the HOA does not dispute." CPC further contends that "the HOA does not address this element at all, much less satisfy it." These irresponsible propositions are easily disproven.

On page 2 of its motion, the Association articulated independent and unique interests in opposing the plan which differ, often substantially, from those of the Planning Commission and City Council. *See* Exhibit A.1 to motion. The Exhibit is a May 21, 2024 letter from the Association to the City Clerk of the City of Castle Pines expressing support for the City's prior opposition to and denial of CPC's SIP. If this is the basis for CPC's argument that the

Association's interests are already adequately represented, CPC did not read the motion closely and must have ignored the Exhibit entirely.

In its motion, the Association asserts that the City Council and Planning Commission should have performed a more rigorous analysis of the original application and identified additional deficiencies justifying denial of the proposed rezoning. In its letter, the Association alleged that the proceedings conducted by the City Council and Planning Commission:

- Did not afford a fair hearing, thus depriving the Association of due process;
- Evincing irreconcilable conflicts of interest of the City which were not addressed;
- Contained constitutionally defective notice provisions and practices; and
- Improperly limited public comment.

These clearly are not allegations that one party relative to another that is purportedly protecting or representing its interests in another proceeding. Moreover, the mere fact that two parties agree with the end result does not mean that one is acting on the other's behalf or protecting its interests. As reflected in the Exhibit, that is certainly not the case here.

#### **B. PERMISSIVE INTERVENTION**

"C.R.C.P. 24(b)(2) allows for permissive intervention when an applicant's contentions and the proceedings present common questions of law or fact," *Moreland v. Alpert*, 124 P.3d 896, 904 (Colo. App. 2005).

Consistent with its straw man arguments made elsewhere, CPC argues that "the HOA's interests will not be—and, indeed, cannot be—affected by the outcome because the Property will still be zoned for fast-food restaurant use." The Association opposes CPC's SIP for the reasons set forth above, in its motion, and in the Exhibit.



The Court may take judicial notice pursuant to C.R.E. 201 that the Association has *not* requested a rezoning of the property in connection with its request to intervene. The Association's concerns are with the SIP and buildout proposals which do not comply with the Comprehensive Plan and which, as proposed, would have avoidable, detrimental impacts on the Castle Pines North community.

The Association's defenses share common questions of law and fact as its interests are similar to those which are the subject matter of this case and which will be affected or impacted by its outcome. *CF & I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 939 (Colo. App. 2003). Permissive intervention affords a separate, individual basis upon which the Court may consider to permit the Association to intervene in this matter.

### **CONCLUSION**

The Association is an immediate, contiguous neighbor to the Plaintiff's property. It has independent and unique property interests in opposing the plan which differ from the City Council. Intervention will not prejudice either party and should be permitted by the Court.

WHEREFORE, The Castle Pines North Homeowners Association, No. 1 respectfully requests it be permitted to intervene in the within matter and for such other and further relief as the Court deems proper.

Respectfully submitted this 18<sup>th</sup> day of September, 2024.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt

Jonah G. Hunt, No. 34379

Marcus T. Wile, No. 49471

*Attorneys for The Castle Pines North Homeowners Association, No. 1*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 18, 2024, a true and correct copy of the foregoing **THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S MOTION TO INTERVENE** was served via LexisNexis/CCEF/U.S. Mail/Email upon the following:

*Counsel of record.*

/s/ Chris A. Cowlshaw  
Chris A. Cowlshaw, Litigation Paralegal

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	<div>DATE FILED September 17, 2024 5:05 PM</div> <div>▲ COURT USE ONLY ▲</div>
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO	
Josh A. Marks, Atty. Reg. # 16953 Geoffrey C. Klingsporn, Atty. Reg. # 38997 BERG HILL GREENLEAF RUSCITTI LLP 1712 Pearl Street Boulder, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com geoff.klingsporn@bhgrlaw.com	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<p style="text-align: center;"><b>ENTRY OF APPEARANCE</b></p>	

Geoffrey C. Klingsporn of Berg Hill Greenleaf Ruscitti LLP hereby certifies that he is a member in good standing of the bar of this Court and enters his appearance as counsel for the Defendant City Council for the City of Castle Pines, Colorado in the above-captioned matter.

Respectfully submitted this 17th day of September 2024.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file  
at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Geoffrey C. Klingsporn*

\_\_\_\_\_  
Josh A. Marks  
Geoffrey C. Klingsporn

*Attorneys for City Council  
for the City of Castle Pines, Colorado*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of September 2024, a true and correct copy of the foregoing **ENTRY OF APPEARANCE** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at Berg  
Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

---

Cheryl Stasiak

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED September 11, 2024 1:40 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>PLAINTIFF CP COMMERCIAL, LLC’S RESPONSE IN OPPOSITION  TO THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION,  NO. 1’S MOTION TO INTERVENE</b></p>	

Plaintiff CP Commercial, LLC (“CP Commercial”), though undersigned counsel, submits its response in opposition to The Castle Pines North Homeowners Association, No. 1’s (the “HOA”) Motion to Intervene (“Motion”), and states as follows:

### **INTRODUCTION**

This appeal has nothing to do with zoning, rezoning, or whether fast-food restaurant use

should be permitted. As explained in CP Commercial’s Complaint, this appeal concerns the City Council’s erroneous denial of a site improvement plan application to develop commercially zoned land owned by CP Commercial in Castle Pines. The site improvement plan application includes plans to build a McDonald’s fast-food restaurant on the property. (*See* Compl., ¶¶ 34–38.) Importantly, the land at issue (the “Property”) ***had already been zoned for commercial use, which includes fast-food restaurant use***, as part of a planned development. (*Id.* ¶¶ 9–22.) Thus, when McDonald’s submitted its site improvement plan, it was not asking the Planning Commission or the City Council to zone (or rezone) the Property to allow fast-food restaurant use. It simply was asking these governmental bodies to approve a site improvement plan for a McDonald’s, which was consistent with the previously approved zoning. (*See id.* ¶¶ 39–64.)

Despite this, the HOA has moved to intervene on the basis that this appeal concerns zoning (or rezoning) of the Property and that its outcome will determine whether a fast-food restaurant can be built on land adjacent to the HOA. (*See* Mot., at 4–5.) In other words, the HOA seeks to intervene here for reasons that are irrelevant and that fundamentally misunderstand the nature of this appeal. For example, the HOA states that “while it agrees with the result, it asserts that the City Council and Planning Commission should have performed a more rigorous analysis of the original application and identified additional deficiencies justifying denial of the proposed rezoning.” (Mot., at 2.) But this C.R.C.P. 106(a)(4) appeal is not about whether the City Council or the Planning Commission denied the application on all potential applicable bases. After all, both bodies voted to deny the site improvement plan application—a result the HOA favored. Rather, this appeal concerns the City Council’s arbitrary and capricious denial of the site improvement plan application based on the reasons the City Council provided in doing so. Presumably, if the

City Council or Castle Pines residents opposed all fast-food restaurant use on the Property, they would have acted to prevent the zoning the Property to allow that use.

The HOA should therefore not be permitted to intervene. Besides numerous deficiencies, the Motion also risks confusing the issues and bogging down the proceedings. And even if this Court wanted to, it could not grant the HOA the relief it seeks because this appeal will in no way affect the Property's zoning. For these reasons, this Court should deny the Motion.

### **LEGAL STANDARD**

Colorado Rule of Civil Procedure 24(a)(2) allows a party to intervene as a matter of right when (1) the applicant claims an interest relating to the subject matter of the litigation; (2) disposition of the action may impair or impede the applicant's ability to protect that interest; and (3) the applicant's interest is not adequately represented by existing parties. Rule 24(b)(2) allows a party to permissively intervene when "an applicant's claim or defense and the main action have a question of law or fact in common."

It is well established in Colorado that while "Rule 24 should be interpreted liberally," *Feigin v. Alexa Grp.*, 19 P.3d 23, 26 (Colo. 2001), "every element must be satisfied, ***and the failure to satisfy one element . . . precludes a motion to intervene,***" *Bolt Factory Lofts Owners Ass'n v. Auto-Owners Ins. Co.*, 487 P.3d 1105, 1109 (Colo. App. 2019) (emphasis added).

### **ARGUMENT**

This Court can, and should, deny the HOA's Motion for several independent reasons. First, the HOA fails to adequately address the elements that an applicant must establish to become an intervenor. Second, no matter which type of intervention the HOA seeks, this Court should deny the Motion because the HOA's alleged "interest" in the Property is insufficient

under Rule 24; the HOA's alleged interest will not be impaired or impeded by this lawsuit; and the HOA's alleged interest is adequately represented by the City Council (the defendant here). And while the Motion does not appear to seek permissive intervention, this Court should deny any such request as well because the HOA has failed to state that it has a claim or defense that shares a common question of law or fact in this lawsuit.

**I. The Court should deny the Motion because the HOA has failed to plead the necessary elements.**

As a preliminary matter, the HOA not only fails to explain whether it seeks to intervene as a matter of right or permissively, it also fails to address every required element a party must satisfy to intervene in a lawsuit. "All three elements of the rule, i.e., a property interest, an impairment in the ability to protect it, and inadequate representation, must be present in order to intervene." *Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987). The Motion, however, only addresses two of the foregoing elements: interest and impairment. If the Court reads the Motion as the HOA seeking intervention as of right, the HOA not only failed to satisfy the third element under Rule 24(a)—that the applicant's interest is not adequately represented by the existing parties—it failed to discuss the element entirely. And if the Court reads the Motion as the HOA seeking permissive intervention, the HOA has again failed to address one of the required elements: that the "applicant's claim or defense and the main action have a question of law or fact in common." C.R.C.P. 24(b).

Thus, whether this Court considers the HOA's Motion under Rule 24(a) (*i.e.*, seeking to intervene as of right) or under Rule 24(b) (*i.e.*, seeking permissive intervention), the Motion should be denied because it fails to address (much less satisfy) the necessary elements. On this basis alone, this Court can, and should, deny the Motion.



**II. Even if this Court looks beyond the Motion’s deficiencies, this Court should still deny the HOA’s request to intervene as of right.**

*The HOA does not state a relevant interest in the subject matter of this appeal.* The first element an applicant must prove to intervene as of right is “an interest relating to the property or transaction which is the subject of the action.” C.R.C.P. 24(a)(2).<sup>1</sup>

The HOA argues that it has an interest in the property because it is an “immediate, contiguous neighbor” of the Property and that courts have held that such neighbors have a sufficient interest in zoning decisions such that they have standing. (Mot., at 4). The HOA then cites to three cases, all of which involve zoning or rezoning, and none of which are on point.

The first case the HOA cites is *Roosevelt v. Beau Monde Co.*, 384 P.2d 96, 103 (Colo. 1963). The HOA argues that it should be allowed to intervene because “[a]djoining property owners in a suit to vacate a zoning order have [] a vital interest in the result of that suit.” (Mot., at 4.) Courts subsequently interpreting *Roosevelt* have noted that “zoning concerns use of land and [] affects adjacent property regardless of whether that property is inside or outside the territorial boundaries of the zoning authority.” *City of Thornton v. Bd. of Cnty. Comm’rs of Adams Cnty.*, 595 P.2d 264, 266 (Colo. App. 1979). But there is no “zoning order” at issue here, so the HOA’s reliance on *Roosevelt* is misplaced. The outcome of this Rule 106(a)(4) appeal will not change the fact that the Property—that is, the “use of [the] land”—has been zoned for fast-food restaurant use. *See id.*

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<sup>1</sup> The HOA does not argue that it may intervene under Rule 24(a)(1), i.e., “[w]hen a statute confers an unconditional right to intervene.”

Next, the HOA cites *Rangeview, LLC v. City of Aurora*, 381 P.3d 445, 459 (Colo. App. 2016). But *Rangeview* is not instructive here. First, *Rangeview* is about standing—not a party’s ability to intervene in a Rule 106(a)(4) appeal. *Id.* Second, even if it did relate to intervention, *Rangeview*, similar to *Roosevelt*, held that “owners of property adjacent to rezoned land have standing to challenge **rezoning** that adversely affects them.” *Id.* (emphasis added).

Finally, the HOA cites *Board of County Commissioners of Adams County v. City of Thornton*, 629 P.2d 605, 609 (Colo. 1981), for the same proposition: “a complaining property owner . . . has a legally protected interest in insulating its property from adverse effects caused by the legally deficient **rezoning** of adjacent property.” (Emphasis added.) Like *Roosevelt* and *Rangeview*, *Adams County* is about standing and rezoning. It does not apply to the issue before this Court, which involves CP Commercial’s site improvement plan application.

The HOA’s asserted interest has no relevancy to this appeal. Again, this appeal has nothing to do with zoning or rezoning. Although a party’s contiguity to another’s land may be enough of an “interest” to confer standing on that party in an action challenging a zoning decision, CP Commercial’s appeal concerns a different issue—the City Council’s denial of the site improvement plan for the Property.

***The HOA’s alleged interest will not be impaired or impeded.*** The second element an applicant seeking to intervene must show is that “the disposition of the underlying action may as a practical matter impair its ability to protect its interest.” *Bolt Factory Lofts*, 487 P.3d at 281 (quoting *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 406 (Colo. 2011)). An applicant can satisfy this element by showing that the disposition of the action “will prevent any future attempts by the applicant to pursue its interest.” *Bolt Factory Lofts*, 487 P.3d at 281.

Crucially, “where there were alternative forums in which to bring a suit, an intervenor is neither impaired nor impeded in [its] ability to protect [its] interests under Rule 24(a)(2).” *Feigin*, 19 P.3d at 30.

The HOA argues that its alleged interest will be impeded or impaired unless it is allowed to intervene here because “its members will be negatively affected by the rezoning, specifically, through nuisance and diminution in property value.” (Mot., at 4.) But even if the HOA has asserted a valid interest (and it has not), the HOA’s alleged interest will not be impaired or impeded for at least three reasons. First, as already explained, zoning or rezoning is not at issue here. Again, the City Council *has already zoned* the Property to allow fast-food restaurant use. (See Compl. ¶¶ 52, 83, 115; *id.*, Ex. 1, at 3, 29.)

Second, the HOA asserts various vague “nuisances” that it believes will occur because of fast-food restaurant use of the Property. (Mot., at 5.) The HOA specifically lists eight “nuisances and negative impacts” that it believes will be caused by “the rezoning.” (*Id.*) But the HOA’s concerns relate to the *use* of the Property: a fast-food restaurant. (*Id.*) (listing various concerns, many of which specifically reference the “proposed use”). The HOA once again ignores that this appeal does not concern the Property’s zoning or use, instead citing Colorado caselaw that neighboring parties have an interest in nearby zoning decisions and therefore the HOA should be allowed to intervene here. The HOA thus misunderstands the nature of this appeal and the remedy that this Court can fashion.

Third, the HOA should have brought its concerns about a fast-food restaurant being built on “property adjacent” to their homeowners to the City (through a lawsuit or otherwise) at the time the City approved the Property’s zoning to allow fast-food restaurant use. The HOA never

did that. In other words, an “alternative forum[]” existed to address the HOA’s nuisance and property value concerns, but the HOA did not bring suit when the City zoned the Property. *See Feigin*, 19 P.3d at 30. It is too late for the HOA to now use this appeal to air its grievances regarding that zoning decision.

***The HOA’s alleged interest is adequately represented, which the HOA does not dispute.***

The final element an applicant must prove is that its interest is not adequately represented by the parties. *Cherokee Metro. Dist.*, 266 P.3 at 407. A party can satisfy this element by showing that its interests are “not represented at all, or if *all* existing parties are adverse to [the applicant].” *Mauro v. State Farm Mut. Auto. Ins. Co.*, 410 P.3d 495, 499 (Colo. App. 2013). Notably, it is the HOA’s burden to satisfy this element, which it does not even attempt to do.

While Colorado courts have held that this burden is minimal, an intervening party must still show *some* form of inadequacy, whether “by showing collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed in fulfilling its duty to represent the applicant’s interest.” *Sanguine, Ltd. v. U.S. Dept. of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984).<sup>2</sup>

The HOA does not address this element at all, much less satisfy it. As discussed above, this Court can deny the Motion on these grounds alone. Even so, the Motion fails on this element. The HOA’s interests are adequately represented by the City—which has two city councilmembers for every district, including the HOA’s—and thus the City Council is not

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<sup>2</sup> Colorado courts interpreting rule that is “virtually identical” to its federal counterpart may rely on federal authority. *Warne v. Hall*, 373 P.3d 588, 592 (Colo. 2016); *see also Cherokee Metro. Dist.*, 266 P.3d at 407; *Feigin*, 19 P.3d at 31–32.

adverse to the HOA. And no facts suggest any collusion between the any party, nor has the City Council failed to fulfill its duty to its constituents.

The HOA thus has not demonstrated that its supposed interest will be impaired by this lawsuit, nor has it explained why the City Council does not adequately represent its interest. This Court should therefore deny the Motion.

### **III. This Court should deny permissive intervention.**

Courts may grant permissive intervention under Rule 24(b) when an applicant’s “claim or defense and the main action have a question of law or fact in common.” An applicant’s claim or defense shares a common question of law or fact when its interests will be affected by the outcome, and when such interests are the subject matter of the case. *See, e.g., CF & I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 939 (Colo. App. 2003); *N. Poudre Irr. Co. v. Hinderlider*, 150 P.2d 304, 309 (Colo. 1944). As discussed above, the HOA’s purported interests will not—and cannot—be affected by the outcome of this case, because no matter how this Court decides CP Commercial’s appeal, the Property will continue to be zoned for fast-food restaurant use.

Again, the HOA does not specify whether it seeks to intervene as of right or permissively. The HOA also does not state a “defense” that shares a common question of law or fact with the main action. C.R.C.P. 24(b). In order to evaluate whether permissive intervention is appropriate, an applicant must actually assert a claim or defense. Rather, the HOA continually asserts that it has an interest in the Property’s zoning of, and that it will experience nuisances and diminution of value based on fast-food restaurant use. These supposed defenses are irrelevant.

This appeal is based solely on the reasons the City Council provided for denying the site improvement plan application, which were arbitrary and capricious.

The HOA's interests will not be—and, indeed, cannot be—affected by the outcome because the Property will still be zoned for fast-food restaurant use. That is, even if this Court affirms the City Council's denial, it will not change the fact that the City permits fast-food restaurants at the Property. Moreover, the HOA's alleged interest is not the subject matter of this case. Rather, the subject matter of this case is straightforward and narrow: whether the City Council erroneously denied the *site improvement plan application*—not a zoning code, not whether fast-food restaurant use constitutes a nuisance, and not whether the construction of a fast-food restaurant will harm the HOA homeowners' property values.

### **CONCLUSION**

For these reasons, CP Commercial respectfully requests that this Court deny the HOA's Motion to Intervene.

Respectfully submitted this 11th day of September, 2024.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
J. Maxwell Porteus, #56405

*Attorneys for Plaintiff CP Commercial, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of September, 2024, I electronically filed a true and correct copy of the foregoing **PLAINTIFF CP COMMERCIAL, LLC'S RESPONSE IN OPPOSITION TO THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S MOTION TO INTERVENE** with the Clerk via Colorado Courts E-Filing which will send notification and service upon the following:

Josh A. Marks  
BERG HILL GREENLEAF RUSCITTI LLP  
1712 Pearl Street  
Boulder, CO 80302  
Telephone: (303) 402-1600  
Email: jam@bhgrlaw.com

*Attorney for City Council for the City of  
Castle Pines, Colorado*

Jonah G. Hunt  
Marcus T. Wile  
ORTEN CAVANAGH HOLMES & HUNT, LLC  
1445 Market Street, Suite 350  
Denver, CO 80202  
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Email: jhunt@ochhoalaw.com

*Attorneys for Intervenor for The Castle Pines North  
Homeowners Association No. 1*

s/ Kate M. Meade  
Kate M. Meade, Paralegal





or to expand the legal issues to be considered by the Court. *See, e.g.*, Motion at 4 (arguing that “its members will be negatively affected by the rezoning, specifically, through nuisance and diminution in property value.”). If so, such arguments would be improper under a Rule 106(a)(4) appeal. “The standard for review in a Rule 106(a)(4) proceeding 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 defendant body or officer.’” *Van Sickel v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990) (quoting C.R.C.P. 106(a)(4)).

In addition, the Motion contains a series of factual assertions, the truth of which the City does not concede. *See* Motion at 5. The Motion may also be untimely. *See Smith v. El Paso Cnty.*, 593 P.2d 979, 981 (Colo. App. 1979) (holding “that under C.R.C.P. 106(b), permissive joinder and permissive intervention can only be effected within 30 days after the final action taken by the tribunal.”).

Respectfully submitted this 11th day of September 2024.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file  
at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Josh A. Marks*

---

Josh A. Marks

*Attorney for City Council  
for the City of Castle Pines, Colorado*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of September 2024, a true and correct copy of the foregoing **DEFENDANT CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO'S RESPONSE TO THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO. 1'S MOTION TO INTERVENE** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Shoshannah Ebersole-Raptor*

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Shoshannah Ebersole-Raptor

DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	DATE FILED August 21, 2024 3:01 PM	
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO	▲ COURT USE ONLY ▲ Case No.: 2024CV30582  Div.:	
<i>Attorneys for The Castle Pines North Homeowners Association, No. 1:</i> ORTEN CAVANAGH HOLMES & HUNT, LLC Jonah G. Hunt, No. 34379 Marcus T. Wile, No. 49471 Address: 1445 Market Street, Suite 350 Denver, CO 80202 Phone Number: (720) 221-9780 Fax Number: (720) 221-9781 Email: <a href="mailto:jhunt@ochhoalaw.com">jhunt@ochhoalaw.com</a>		
<p style="text-align: center;"><b>THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S MOTION TO INTERVENE</b></p>		

The Castle Pines North Homeowners Association, No. 1 (“Association”), by and through counsel, hereby submits its Motion to Intervene pursuant to C.R.C.P. 24 and 19(a) and, in support thereof, states as follows:

*Certificate of Conferral Pursuant to C.R.C.P. 121 § 1-15(8):* Undersigned counsel conferred with counsel of record regarding the relief sought herein. Respective counsel have not indicated substantive positions on the Association’s motion as of the date of this filing.

## **INTRODUCTION**

This action seeks judicial reversal of the decision of the Castle Pines City Council to deny a site improvement plan (“SIP”) for a fast-food restaurant. The SIP was denied as the plan does not support the applicable goals and objectives of the City of Castle Pines Comprehensive Plan, and does not further public health, safety, and welfare of the community. The City Council did not exceed its authority or abuse its discretion in denying the application to rezone the property.

The Association understands that the City Council will be defending its decision in this action. However, the Association has independent, unique, and vested property interests in opposing the plan which differ from the City Council. *See Exhibit A.*<sup>1</sup> The Association is also an immediate, contiguous neighbor to the Plaintiff’s Parkway Plaza development, which includes the 1.3-acre subject lot located at the southwest intersection of Castle Pines Parkway and Lagae Road in Castle Pines, Colorado.

Intervention will not prejudice either party and should be permitted by the Court.

## **LEGAL STANDARD**

C.R.P.C. 24(a) provides for intervention as a right for anyone, upon timely application, “when the applicant claims an interest in relation to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical

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<sup>1</sup> Indeed, while the Association agrees with the result, it asserts that the City Council and Planning Commission should have performed a more rigorous analysis of the original application and identified additional deficiencies justifying denial of the proposed rezoning.

matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.”

“C.R.C.P. 24(b) provides for permissive intervention when an applicant's claim and the original cause of action present common questions of law or fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties.” *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1999).

Adjoining property owners in a suit to vacate a zoning order have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown. *Roosevelt v. Beau Monde Co.*, 152 Colo. 567, 384 P.2d 96 (1963).

Finally, C.R.C.P. 19(a)(2) provides that a person shall be joined as a party in the action if party claims an interest relating to the subject of the action and is so situated that the disposition of the action in the party's absence may, as a practical matter, impair or impede his ability to protect that interest. *Atrium Condo Ass'n v. NHK Invs. LLC*, 2016 Colo. Dist. LEXIS 1879, \*3.

### **ARGUMENT**

#### **A. The Association's Motion Is Timely**

Whether a motion to intervene pursuant to C.R.C.P. 24 is timely or not is a threshold question to be made by the Court considering all the circumstances in the case. *Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987). In *Diamond Lumber*, a lawsuit was filed by the parties and litigation proceeded for 16 months before a motion was made. *Diamond Lumber, Inc.*, 746 P.2d at 78.

Here, this matter is still in its infancy as it was filed less than two months ago. No disclosures have been exchanged, no case management order entered, no trial set, etc.

**B. The Association Has An Interest In The Property Which Is The Subject Of The Action**

As noted above, the Association is an immediate, contiguous neighbor to the Plaintiff's 1.3-acre property. It is well settled law in Colorado that owners of property adjacent to rezoned land have standing to challenge rezoning that adversely affects them. *Rangeview, LLC v. City of Aurora*, 381 P.3d 445, ¶ 12 (Colo. App. 2016) (citations omitted). "A complaining property owner... has a legally protected interest in insulating its property from adverse effects caused by the legally deficient rezoning of adjacent property." *Board of County Com'rs of Adams County v. City of Thornton*, 629 P.2d 605 (Colo. 1981).

**C. The Association's Interest Will Be Impeded Or Impaired If It Is Not Allowed To Intervene**

The Association's injury-in-fact is that its members will be negatively affected by the rezoning, specifically, through nuisance and diminution in property value. A claim for nuisance is predicated upon a substantial invasion of an individual's interest in the use and enjoyment of his property. *Hoery v. United States*, 64 P.3d 214, 218 (Colo. 2003). Conduct constituting a nuisance can include indirect or physical conditions created by defendant that cause harm. RESTATEMENT (SECOND) OF TORTS § 834, cmt. b.

The injury may be tangible, such as physical damage or economic harm; however, it may also be intangible, such as aesthetic issues. Deprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact. *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1058 (Colo. 1980). Diminution of value of the Association's

and its owners' property constitutes injury-in-fact. *Board of County Com'rs of Adams County v. City of Thornton*, 629 P.2d 605 (Colo. 1981).

The following nuisances and negative impacts of the rezoning, by way of illustration, rather than limitation, are shown on Exhibit A:

- The proposed double drive-through is designed, per the applicant's admission, to drive substantial traffic from I-25 resulting in 75% of the business being drive through. *See Comprehensive Plan Section ED-2.2.*
- The proposed double drive-through will create barriers to safe pedestrian connectivity from the Association's neighborhood, to and from American Academy, and to and from the Montessori School. *See Comprehensive Plan Section ED-2.3.*
- The proposed use will degrade bicycle and pedestrian traffic in the area of two schools and a park especially around peak times. *See Comprehensive Plan Section T-2.3.*
- Because of the challenging ingress and egress pattern to the proposed facility, connectivity, accessibility, safety and comfort of pedestrian and bicycling uses will be degraded and not improved. *See Comprehensive Plan Section T-3.*
- The proposed use degrades multi-modal, especially bicycles and pedestrians, because of the impacts on Castle Pines Parkway and Lagae Road with the challenging ingress and egress and plans to drive additional traffic volumes to and through Castle Pines Parkway and Lagae Road. *See Comprehensive Plan Section T-5.*
- The proposed use does not maintain the single-family housing character with the location of an intense drive-thru use within 500 feet of existing single-family housing. Instead, it substantially impairs the single-family character due to increased traffic, noise, air and light pollution, litter, and public safety issues. *See Comprehensive Plan Section H-1.2.*
- The applicant has failed to show that it will minimize negative impacts of light and noise pollution from vehicles in the drive through and minimize impacts of light and noise pollution. *See Comprehensive Plan Section LU-5.1.*
- Given the restricted ingress and egress to the location, the proposed use will result in a substantially negative impact on existing traffic patterns and emergency services from South Metro Fire & Rescue. *See Comprehensive Plan Section LU-8.1.*

### **CONCLUSION**

The Association is an immediate, contiguous neighbor to the Plaintiff's property. It has independent, unique, and vested property interests in opposing the plan which differ from the City Council. Intervention will not prejudice either party and should be permitted by the Court.

WHEREFORE, The Castle Pines North Homeowners Association, No. 1 respectfully requests it be permitted to intervene in the within matter.

Respectfully submitted this 21st day of August, 2024.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt

Jonah G. Hunt, No. 34379

Marcus T. Wile, No. 49471

*Attorneys for The Castle Pines North Homeowners  
Association, No. 1*

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2024, a true and correct copy of the foregoing **THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S MOTION TO INTERVENE** was served via LexisNexis/CCEF/U.S. Mail/Email upon the following:

*Counsel of record.*

/s/ Chris A. Cowlishaw

Chris A. Cowlishaw, Litigation Paralegal



DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200		DATE FILED August 21, 2024 3:01 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO		▲ COURT USE ONLY ▲ Case No.: 2024CV30582  Div.:
<i>Attorneys for The Castle Pines North Homeowners Association, No. 1:</i> ORTEN CAVANAGH HOLMES & HUNT, LLC Jonah G. Hunt, No. 34379 Marcus T. Wile, No. 49471 Address: 1445 Market Street, Suite 350 Denver, CO 80202 Phone Number: (720) 221-9780 Fax Number: (720) 221-9781 Email: <a href="mailto:jhunt@ochhoalaw.com">jhunt@ochhoalaw.com</a> <a href="mailto:mwile@ochhoalaw.com">mwile@ochhoalaw.com</a>		
<p style="text-align: center;"><b>THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S ANSWER TO COMPLAINT</b></p>		

Intervening Defendant The Castle Pines North Homeowners Association, No. 1 ("Association" or "CPN"), by and through its attorneys Orten Cavanagh Holmes & Hunt, LLC, hereby answers the Complaint of Plaintiff CP Commercial, LLC's ("Plaintiff"), as follows:

### **NATURE OF ACTION**

1. As to the allegations set forth in Paragraphs 1 of the Complaint, the Association denies same.

### **PARTIES**

2. As to the allegations set forth in Paragraphs 2 and 3, the Association admits same.

### **JURISDICTION**

3. As to the allegations set forth in Paragraphs 5 and 6, the Association admits the Court has jurisdiction over the parties and subject matter of this action, and venue is proper.

4. As to the remaining allegations set forth in Paragraphs 3, 4, 7 and 8, the Association is without sufficient information to admit or deny the allegations and therefore denies the same.

### **GENERAL ALLEGATIONS**

5. As to the allegations set forth in Paragraphs 9 through 108, the Association is without sufficient information to admit or deny the allegations and therefore denies the same.

### **CLAIM FOR RELIEF**

#### **Judicial Review Pursuant to C.R.C.P. 106(a)(4)**

6. Defendant admits that the decision at issue is a final “quasi-judicial” decision for purposes of C.R.C.P. 106(a)(4) review. However, the allegations set forth in Paragraphs 109 through 123, are statements of law or legal conclusions to which no response is required. To the extent a response is required, the Association denies the same.

### **PRAYER FOR RELIEF**

7. The Association denies that Plaintiff is entitled to the relief sought.

### **ANSWER AND GENERAL DENIAL**

8. The Association denies each and every allegation, averment, statement or conclusion of law, implication, interpretation, or inference of the claims provided for in the Complaint not specifically admitted above.

### **AFFIRMATIVE DEFENSES**

1. Plaintiff’s Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff’s claims may be barred in that the City did not abuse its discretion or exceed its jurisdiction in denying Plaintiff’s Site Improvement Plan or appeal.
3. Plaintiff may have failed to reasonably mitigate their damages.
4. Plaintiff’s damages, if any, may have been caused by their own conduct, which conduct bars or diminishes any recovery of damages.

5. Plaintiff's claims may be barred by the doctrine of unclean hands.

6. Plaintiff's claims may be barred by their failure to act in good faith.

7. The Association reserves the right to amend its Answer to add, modify or withdraw affirmative defenses, counterclaims or cross claims, or a third-party complaint, which may become apparent upon the completion of investigation, disclosure and discovery in this matter.

### **Prayer for Relief**

WHEREFORE, The Castle Pines North Homeowners Association, No. 1 respectfully requests this Honorable Court find in its favor, dismiss each of the Plaintiff's claims with prejudice, award it its reasonable attorney fees and costs, and for such other and further relief as this Court deems proper.

Respectfully submitted this 21st day of August, 2024.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt

Jonah G. Hunt, No. 34379

Marcus T. Wile, No. 49471

*Attorneys for The Castle Pines North Homeowners  
Association, No. 1*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2024, a true and correct copy of the foregoing **THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S ANSWER TO COMPLAINT** was served via LexisNexis/CCEF/U.S. Mail/Email upon the following:

*Counsel of record.*

/s/ Chris A. Cowlshaw  
Chris A. Cowlshaw, Litigation Paralegal

DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200		DATE FILED August 21, 2024 3:01 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  vs.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO		▲ COURT USE ONLY ▲ Case No.: 2024CV30582 Div.:
<p align="center"><b>ORDER GRANTING THE CASTLE PINES NORTH HOMEOWNERS ASSOCIATION, NO.1'S MOTION TO INTERVENE</b></p>		

THIS MATTER comes before the Court on The Castle Pines North Homeowners Association, No. 1's motion to intervene, and the Court being duly advised in this matter and upon consideration and finding good cause,

HEREBY ORDERS that the Motion is GRANTED and the Court further orders, adjudges and decrees as follows:

- 1) The Castle Pines North Homeowners Association, No. 1 is hereby added as a party to this action, and
- 2) The Castle Pines North Homeowners Association, No. 1's Answer to Plaintiff's Complaint, filed contemporaneously with Plaintiff's Motion to Intervene, is hereby accepted for filing on the Court's Docket.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2024.

BY THE COURT:

\_\_\_\_\_  
 Judge/Magistrate

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	<p style="text-align: center;">DATE FILED August 19, 2024 5:36 PM</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO	
Josh A. Marks, Atty. Reg. # 16953 BERG HILL GREENLEAF RUSCITTI LLP 1712 PEARL STREET BOULDER, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<b>NOTICE OF FILING CERTIFIED RECORD</b>	

Defendant, City Council for the City of Castle Pines, Colorado, through its undersigned counsel, hereby gives written notice to all parties that the record is being filed on this date. The Certificate of Authenticity, with attached document index and electronic record, is filed herewith as **Exhibit A**.

Respectfully submitted this 19th day of August, 2024.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file  
at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Josh A. Marks*

\_\_\_\_\_  
Josh A. Marks

*Attorney for City Council  
for the City of Castle Pines, Colorado*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of August, 2024, a true and correct copy of the foregoing **NOTICE OF FILING CERTIFIED RECORD** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at  
Berg Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

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Cheryl Stasiak

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	<p style="text-align: right; color: blue;">DATE FILED August 19, 2024 5:38 PM</p> <p style="text-align: center; font-weight: bold;">▲ COURT USE ONLY ▲</p>
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO	
Josh A. Marks, Atty. Reg. # 16953 BERG HILL GREENLEAF RUSCITTI LLP 1712 PEARL STREET BOULDER, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<b>NOTICE OF FILING CERTIFIED RECORD</b>	

Defendant, City Council for the City of Castle Pines, Colorado, through its undersigned counsel, hereby gives written notice to all parties that the record is being filed on this date. The Certificate of Authenticity, with attached document index and electronic record, is filed herewith as **Exhibit A**.

Respectfully submitted this 19th day of August, 2024.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file  
at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Josh A. Marks*

\_\_\_\_\_  
Josh A. Marks

*Attorney for City Council  
for the City of Castle Pines, Colorado*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of August, 2024, a true and correct copy of the foregoing **NOTICE OF FILING CERTIFIED RECORD** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at  
Berg Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

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Cheryl Stasiak

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 (720) 437-6200	<p style="text-align: center;">DATE FILED August 19, 2024 5:40 PM</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<b>Plaintiff(s):</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  <b>v.</b>  <b>Defendant(s):</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO	
Josh A. Marks, Atty. Reg. # 16953 BERG HILL GREENLEAF RUSCITTI LLP 1712 PEARL STREET BOULDER, CO 80302 Tel: (303) 402-1600 Fax: (303) 402-1601 jam@bhgrlaw.com	Case Number: 2024CV30582  Div.: 6      Ctrm.:
<b>NOTICE OF FILING CERTIFIED RECORD</b>	

Defendant, City Council for the City of Castle Pines, Colorado, through its undersigned counsel, hereby gives written notice to all parties that the record is being filed on this date. The Certificate of Authenticity, with attached document index and electronic record, is filed herewith as **Exhibit A**.

Respectfully submitted this 19th day of August, 2024.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file  
at Berg Hill Greenleaf Ruscitti LLP]*

*s/ Josh A. Marks*

\_\_\_\_\_  
Josh A. Marks

*Attorney for City Council  
for the City of Castle Pines, Colorado*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of August, 2024, a true and correct copy of the foregoing **NOTICE OF FILING CERTIFIED RECORD** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

*[Pursuant to Rule 121, the signed original is on file at  
Berg Hill Greenleaf Ruscitti LLP]*

*s/ Cheryl Stasiak*

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Cheryl Stasiak



Plan appeal for its property.

In light of the existing procedures for resolution of a C.R.C.P. 106(a)(4) claim (via briefing based upon a review of the record), a paragraph-by-paragraph response to each allegation of the complaint is unnecessary as it has no impact upon the resolution of the case and does not narrow any issues that must be resolved by the Court through the briefing of this matter.

To the extent a specific response to each averment is required, the Defendant denies or is without sufficient information and belief, and therefore denies any allegation not specifically addressed above.

#### **AFFIRMATIVE DEFENSES**

1. Defendant reserves its right to assert any defense or affirmative defense through the C.R.C.P. 106(a)(4) briefing process.

WHEREFORE, the Defendant City Council for the City of Castle Pines, Colorado respectfully requests this Court affirm the Defendant's quasi-judicial decision plus award them its costs in defense of this matter, plus such further relief as this Court deems appropriate.

Respectfully submitted this 18th day of July, 2024.

BERG HILL GREENLEAF RUSCITTI LLP

*[Pursuant to Rule 121, the signed original is on file at  
Berg Hill Greenleaf Ruscitti LLP]*

*s/ Josh A. Marks*

---

Josh A. Marks

*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of July, 2024, a true and correct copy of the foregoing **ANSWER TO COMPLAINT** was served electronically via CES and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

Carolynne C. White  
David B. Meschke  
J. Maxwell Porteus  
Brownstein Hyatt Farber Schreck, LLP  
675 15th Street, Suite 2900  
Denver, CO 80202

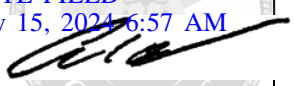
*[Pursuant to Rule 121, the signed original is on file at  
Berg Hill Greenleaf Ruscitti LLP]*

*s/ Shoshannah Ebersole-Raptor*

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Shoshannah Ebersole-Raptor

**GRANTED BY COURT**  
**07/15/2024**

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED July 15, 2024 6:57 AM  <b>ANDREW BAUM</b> District Court Judge
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
	Case Number: 2024CV030582  Div.: 6
<b>ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR CERTIFICATION OF THE RECORD PURSUANT TO C.R.C.P. 106(a)(4)(III)</b>	

THIS MATTER comes before the Court on Plaintiff CP Commercial, LLC's Unopposed Motion for Certification of the Record pursuant to C.R.C.P. 106(a)(4)(III) (the "Motion").

The Court, having reviewed the Motion and being otherwise fully advised in the matter, hereby GRANTS the Motion and ORDERS that the following writings and recordings be certified as the record for this matter:

- City Council Agenda Packet for May 28, 2024 and Hearing Packet for Item 8.a on said agenda (the "Hearing Packet").
- Written public comments received by City Council after the deadline for including comments in the Hearing Packet and prior to or during the May 28, 2024 City Council Hearing from: Brad Behan, Moya Hall, Roger Rostvold, and Bob KaserLagae Family Trust Parcel Traffic Impact Analysis, dated May 14, 2020.

- Transcript of May 28, 2024 City Council hearing on Case No. SIP 2023-003 (forthcoming).
- Sections 1, 2, 11, 15, and 27 of the City of Castle Pines Zoning Ordinances. CP Commercial and the City Council further agree that the City Zoning Ordinance, which is publicly available at <https://online.encodeplus.com/regs/castlepines-co/doc-viewer.aspx#secid-1056>, may be cited during upcoming briefing as if incorporated in the record.
- Parkway Plaza Planned Development Plan.
- Ordinance No. 23-09 approving the Parkway Plaza Planned Development Plan, Case No. RPD-2022-002.
- City of Castle Pines Comprehensive Plan, adopted June 24, 2021 and ratified July 13, 2021.
- Executed Resolution No. 24-39 regarding McDonald's Drive-Thru Site Improvement Plan, Case No. SIP 2023-003.

The Court further ORDERS that the Municipal Code of the City of Castle Pines, Colorado, which is publicly available at [https://library.municode.com/co/castle\\_pines](https://library.municode.com/co/castle_pines), may be cited during upcoming briefing as if incorporated in the record.

The Court further ORDERS that the City Council has 30 days from the date of this Order to file the record with the Clerk of this Court.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2024

BY THE COURT

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District Court Judge



DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED July 10, 2024 4:33 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com	Case Number: 2024CV030582  Div.: 6
<p style="text-align: center;"><b>PLAINTIFF’S UNOPPOSED MOTION FOR CERTIFICATION OF THE RECORD PURSUANT TO C.R.C.P. 106(a)(4)(III)</b></p>	

Plaintiff CP Commercial, LLC (“CP Commercial”), through undersigned counsel, and pursuant to C.R.C.P. 106(a)(4)(III), submits the following Unopposed Motion for Certification of the Record, and in support states as follows:

**CERTIFICATE OF CONFERRAL UNDER C.R.C.P. 121 § 1-15(8)**

Undersigned counsel certifies that they have conferred with counsel for Defendant City Council for the City of Castle Pines, Colorado (“City Council”) regarding the relief requested in

this motion. City Council does not oppose the relief requested herein.

1. C.R.C.P. 106(a)(4)(III) provides that a plaintiff initiating an action for review of a governmental body's exercise of its quasi-judicial function may submit a motion and proposed order requiring certification of a record. A motion to certify the record is not required to confer jurisdiction on the Court to review the governmental body's or officer's actions. *E.g., U-Tote-M of Colo., Inc. v. City of Greenwood Village*, 563 P.2d 373, 375 (Colo. App. 1977); C.R.C.P. 106(a)(4)(VII) ("If no record is requested by the plaintiff, the plaintiff shall file an opening brief within 42 days after defendant has served its answer upon the plaintiff."). However, certification of a record assists the parties and the Court by identifying the evidence in the record before that body or officer, which will facilitate the Court's determination as to whether the body or officer exceeded its jurisdiction or abused its discretion under C.R.C.P. 106(a)(4)(I).

2. Plaintiff requests certification of the following writings and recordings—as defined by C.R.E. 1001(1)—presented to the City Council for the City of Castle Pines, Colorado, in the course of this body's exercise of its chartered or delegated quasi-judicial functions in denying the site improvement plan for a McDonald's on CP Commercial's property:

(a) City Council Agenda Packet for May 28, 2024 and Hearing Packet for Item 8.a on said agenda (the "Hearing Packet").

(b) Written public comments received by City Council after the deadline for including comments in the Hearing Packet and prior to or during the May 28, 2024 City Council Hearing from: Brad Behan, Moya Hall, Roger Rostvold, and Bob KaserLagae Family Trust Parcel Traffic Impact Analysis, dated May 14, 2020.

(c) Transcript of May 28, 2024 City Council hearing on Case No. SIP 2023-003 (forthcoming).

(d) Sections 1, 2, 11, 15, and 27 of the City of Castle Pines Zoning Ordinances. CP Commercial and the City Council further agree that the City Zoning Ordinance, which is publicly available at <https://online.encodeplus.com/regs/castlepines-co/doc-viewer.aspx#secid-1056>, may be cited during upcoming briefing as if incorporated in the record.

(e) Parkway Plaza Planned Development Plan.

(f) Ordinance No. 23-09 approving the Parkway Plaza Planned Development Plan, Case No. RPD-2022-002.

(g) City of Castle Pines Comprehensive Plan, adopted June 24, 2021 and ratified July 13, 2021.

(h) Executed Resolution No. 24-39 regarding McDonald's Drive-Thru Site Improvement Plan, Case No. SIP 2023-003.

3. CP Commercial and the City Council further agree that the Municipal Code of the City of Castle Pines, Colorado, which is publicly available at [https://library.municode.com/co/castle\\_pines](https://library.municode.com/co/castle_pines), may be cited during upcoming briefing as if incorporated in the record.

4. The City Council agrees that it has 30 days from the Court's issuance of the Order to Certify the Record to file the record with the Clerk of this Court.

Respectfully submitted this 10th day of July, 2024.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
J. Maxwell Porteus, #56405

*Attorneys for Plaintiff CP Commercial, LLC*

29726002

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	<div style="text-align: right; color: blue;">       DATE FILED        July 10, 2024 4:33 PM     </div> <div style="text-align: center; margin-top: 100px;"> <b>▲ COURT USE ONLY ▲</b> </div>
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	
	Case Number: 2024CV030582  Div.: 6
<b>ORDER GRANTING PLAINTIFF’S UNOPPOSED MOTION FOR          CERTIFICATION OF THE RECORD PURSUANT TO C.R.C.P.          106(a)(4)(III)</b>	

THIS MATTER comes before the Court on Plaintiff CP Commercial, LLC’s Unopposed Motion for Certification of the Record pursuant to C.R.C.P. 106(a)(4)(III) (the “Motion”).

The Court, having reviewed the Motion and being otherwise fully advised in the matter, hereby GRANTS the Motion and ORDERS that the following writings and recordings be certified as the record for this matter:

- City Council Agenda Packet for May 28, 2024 and Hearing Packet for Item 8.a on said agenda (the “Hearing Packet”).
- Written public comments received by City Council after the deadline for including comments in the Hearing Packet and prior to or during the May 28, 2024 City Council Hearing from: Brad Behan, Moya Hall, Roger Rostvold, and Bob KaserLagae Family Trust Parcel Traffic Impact Analysis, dated May 14, 2020.

- Transcript of May 28, 2024 City Council hearing on Case No. SIP 2023-003 (forthcoming).
- Sections 1, 2, 11, 15, and 27 of the City of Castle Pines Zoning Ordinances. CP Commercial and the City Council further agree that the City Zoning Ordinance, which is publicly available at <https://online.encodeplus.com/regs/castlepines-co/doc-viewer.aspx#secid-1056>, may be cited during upcoming briefing as if incorporated in the record.
- Parkway Plaza Planned Development Plan.
- Ordinance No. 23-09 approving the Parkway Plaza Planned Development Plan, Case No. RPD-2022-002.
- City of Castle Pines Comprehensive Plan, adopted June 24, 2021 and ratified July 13, 2021.
- Executed Resolution No. 24-39 regarding McDonald's Drive-Thru Site Improvement Plan, Case No. SIP 2023-003.

The Court further ORDERS that the Municipal Code of the City of Castle Pines, Colorado, which is publicly available at [https://library.municode.com/co/castle\\_pines](https://library.municode.com/co/castle_pines), may be cited during upcoming briefing as if incorporated in the record.

The Court further ORDERS that the City Council has 30 days from the date of this Order to file the record with the Clerk of this Court.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2024

BY THE COURT

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District Court Judge




“Waiver”) shall have the same force and effect as if the documents had been duly issued, served and returned as provided by law in accordance with the Colorado Rules of Civil Procedure.

By acceptance of this Waiver, my client consents to the Court’s jurisdiction to the same extent as if personal service had been made upon it, and hereby waive the necessity for any other service.

The undersigned understands that a responsive pleading is due on or before 21 days from the date indicated below.

DATED this 27<sup>th</sup> day of June, 2024.

  
\_\_\_\_\_  
Linda Michow



☐ **FORM 1.2. DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND**

DATE FILED  
June 25, 2024 6:16 PM

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	▲ COURT USE ONLY ▲
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteus@bhfs.com	Case Number:  Div.:
<b>DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND</b>	

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, crossclaim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases or in Water (CW) proceedings subject to sections 37-92-302 to 37-92-305, C.R.S. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

2. Simplified Procedure under C.R.C.P. 16.1 **applies** to this case **unless** (check one box below if this party asserts that C.R.C.P. 16.1 **does not** apply):

- ☒ This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**
- ☐ This party is seeking a monetary judgment against another party of more than \$100,000.00, exclusive of interest and costs, as supported by the following certification:

By my signature below and in compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed \$100,000.

**Or**

- ☐ Another party has previously filed a cover sheet stating that C.R.C.P. 16.1 does not apply to this case.
3. ☐ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Dated: June 25, 2024.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
J. Maxwell Porteus, #56405

*Attorneys for Plaintiff CP Commercial, LLC*

## NOTICE

This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	<div style="text-align: right; color: blue;">           DATE FILED            June 25, 2024 6:16 PM         </div> <div style="text-align: center; margin-top: 100px;"> <b>▲ COURT USE ONLY ▲</b> </div>
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	
<i>Attorneys for Plaintiff:</i>  Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com	Case Number:  Div.:
<b>DISTRICT COURT CIVIL SUMMONS</b>	

**TO THE ABOVE NAMED DEFENDANT: CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO**

**YOU ARE HEREBY SUMMONED** and required to file with the Clerk of this Court an answer or other response to the attached Complaint. If service of the Summons and Complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 21 days after such service upon you. If service of the Summons and Complaint was made upon you outside of the State of Colorado, you are required to file your answer or other response within 35 days after such service upon you. Your answer or counterclaim must be accompanied with the applicable filing fee.

If you fail to file your answer or other response to the Complaint in writing within the applicable time period, the Court may enter judgment by default against you for the relief demanded in the Complaint without further notice.

Dated: June 25, 2024.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/David B. Meschke  
Carolynne C. White, #23437  
David B. Meschke, #47728  
J. Maxwell Porteus, #56405

*Attorneys for Plaintiff CP Commercial, LLC*

**This Summons is issued pursuant to Rule 4, C.R.C.P., as amended. A copy of the Complaint must be served with this Summons. This form should not be used where service by publication is desired.**

**WARNING:** A valid summons may be issued by a lawyer and it need not contain a court case number, the signature of a court officer, or a court seal. The plaintiff has 14 days from the date this summons was served on you to file the case with the court. You are responsible for contacting the court to find out whether the case has been filed and obtain the case number. If the plaintiff files the case within this time, then you must respond as explained in this summons. If the plaintiff files more than 14 days after the date the summons was served on you, the case may be dismissed upon motion and you may be entitled to seek attorney's fees from the plaintiff.

**TO THE CLERK:** If the summons is issued by the clerk of the court, the signature block for the clerk or deputy should be provided by stamp, or typewriter, in the space to the left of the attorney's name.

DISTRICT COURT, DOUGLAS COUNTY, COLORADO 4000 Justice Way, Suite 2009 Castle Rock, CO 80109 Telephone: (720) 437-6200	DATE FILED June 25, 2024 6:16 PM
<b>Plaintiff:</b> CP COMMERCIAL, LLC, a Colorado limited liability company,  v.  <b>Defendant:</b> CITY COUNCIL FOR THE CITY OF CASTLE PINES, COLORADO.	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Carolynne C. White, #23437 David B. Meschke, #47728 J. Maxwell Porteus, #56405 BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 15 <sup>th</sup> Street, Suite 2900 Denver, CO 80202 Phone: 303.223.1100 Fax: 303.223.1111 Email: cwhite@bhfs.com; dmeschke@bhfs.com; mporteurus@bhfs.com	Case Number:  Div.:
<p style="text-align: center;"><b>COMPLAINT</b></p>	

Plaintiff CP Commercial, LLC (“CP Commercial”), through undersigned counsel, brings this Complaint pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure against Defendant City Council for the City of Castle Pines, Colorado (the “City Council”), and states and alleges as follows:

### **NATURE OF THE ACTION**

This dispute addresses the erroneous decision by the City Council to deny a site improvement plan for a fast-food restaurant building with a McDonald’s. CP Commercial is the property owner that consented to the plan’s submission. Although the site falls within a planned development that allows for fast-food use, the City Council arbitrarily and capriciously denied the site improvement plan on the nebulous bases that (a) the plan does not support the applicable

goals and objectives of the City of Castle Pines Comprehensive Plan because of the nature of drive-through use and the lack of outdoor eating spaces and (b) the plan does not further public health, safety, and welfare of the community because it could add traffic to an already existing traffic problem. These bases were pretextual: the City Council denied the site improvement plan because a majority of its members and/or vocal town residents did not want a fast-food restaurant, specifically a McDonald's, at that location. The City Council's decision was arbitrary, and must be overturned and vacated.

## **PARTIES**

1. CP Commercial is a Colorado limited liability company with its principal address at 8678 Concord Center Drive, #200, Englewood, Colorado 80112, and its registered place of business listed as 5800 S Nevada St, Littleton, Colorado 80120. CP Commercial owns approximately 1.3 acres (the "Property") generally located at the southwest intersection of Castle Pines Parkway and Lagae Road in Castle Pines, Colorado.

2. The City Council is a governmental body created under the City of Castle Pines Home Rule Charter. Under Section 2-2-10 of the Municipal Code of the City of Castle Pines, Colorado (the "Municipal Code"),<sup>1</sup> the City is the legislative body for the City of Castle Pines, Colorado (the "City"). Pursuant to Section 27 of the City of Castle Pines Zoning Ordinances ("Section 27"),<sup>2</sup> and specifically Paragraph 2704.06.03 therein, the City Council serves in a quasi-judicial role to review de novo an appeal of the Planning Commission's decision on a site improvement plan.

## **JURISDICTION AND VENUE**

3. This dispute concerns the City Council's unlawful decision to deny an application for a site improvement plan for a McDonald's drive-through restaurant on CP Commercial's property (the "SIP").

4. In reviewing an appeal of the Planning Commission's decision on the SIP, the Board was tasked with applying the "Approval Standards" in Paragraph 2703.01 of Section 27, which renders its decision quasi-judicial in nature.

5. This Court has jurisdiction over the parties and subject matter of this action pursuant to Colorado Rule of Civil Procedure 106(a)(4) and C.R.S. §§ 13-51.5-101 to 103.

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<sup>1</sup> The Municipal Code is publicly available and can be found at: [https://library.municode.com/co/castle\\_pines/codes/municipal\\_code?nodeId=MUCOCAPICO](https://library.municode.com/co/castle_pines/codes/municipal_code?nodeId=MUCOCAPICO).

<sup>2</sup> Section 27 is publicly available and can be found at: <https://www.castlepinesco.gov/wp-content/uploads/2019/10/SECTION-27-SITE-IMPROVEMENT-PLAN.pdf>. More broadly, the City's zoning ordinances can be accessed at: <https://www.castlepinesco.gov/city-services/city-departments/community-development/land-use-zoning/zoning/zoning-ordinances/>.

6. Venue is proper in this Court under Colorado Rule of Civil Procedure 98(a) because this action concerns real property located in Douglas County, Colorado.

7. CP Commercial's claims are ripe because the City Council considered an appeal of the Planning Commission's denial of the SIP at a public meeting held on May 28, 2024. Sufficient notice was provided before the public meeting. The City Council's decision is a final determination of a governmental body pursuant to Paragraph 2704.06.03 of Section 27.

8. CP Commercial is under contract to sell the Property to be leased for a McDonald's, and thus will suffer injury-in-fact to its legally protected interests if CP Commercial cannot close on the contract to sell and the Property cannot be used for a fast-food restaurant, and specifically a McDonald's.

### **GENERAL ALLEGATIONS**

#### **I. THE PROPERTY AND ITS ZONING**

9. The Property comprises approximately 1.3 acres and is located at the southwest quadrant of Castle Pines Parkway and Lagae Road within the Parkway Plaza Planned Development. The Property is located on Lot 3 of the Lagae Family Trust Development. The surrounding land uses to the north, south, east, and west are designated to be commercial.

10. The Property has a rectangular shape and is bounded by Castle Pines Parkway to the north, a drainage tract to the east, and a private drive to the south and west. A private drive connects the Property to Castle Pines Parkway to the north and Lagae Road to the east.

11. Douglas County originally zoned the Property as a "Business District" in the 1950s.

12. When the City was incorporated in 2008, the Property was included in the City's boundaries and maintained the Business District zoning.

13. Under Paragraph 1102.11 of Section 11 of the City of Castle Pines Zoning Ordinances, "Restaurant/fast-food establishment" is a principal use for Business Districts.<sup>3</sup>

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<sup>3</sup> Section 11 is publicly available and can be found at: <https://www.castlepinesco.gov/wp-content/uploads/2019/09/SECTION-11-B-BUSINESS-DISTRICT.pdf>.

14. On or about August 8, 2023, the City Council approved the Parkway Plaza Planned Development Plan, Case No. RPD-2022-002, as part of Ordinance No. 23-09.<sup>4</sup>

15. As part of this approval, the City found that the Parkway Plaza Planned Development complied with the City of Castle Pines Comprehensive Plan (the “Comprehensive Plan”) because this is one of the approval criteria for review of planned development rezoning applications under Section 15 of the City of Castle Pines Zoning Ordinances (“Section 15”).<sup>5</sup>

16. The Property is located within Planning Area 3 (“PA 3”) of the Parkway Plaza Planned Development.

17. As part of the approval of the Parkway Plaza Planned Development, the Property was rezoned, resulting in PA 3 being currently zoned as Commercial 2.<sup>6</sup>

18. Commercial 2 permits various principal uses, including a “fast-food establishment.”

19. The proposed McDonald’s drive-through restaurant is a fast-food establishment and therefore a permitted principal use in conformance with the zoning.

20. The property governed by the Parkway Plaza Planned Development is currently undeveloped.

21. CP Commercial is under contract to sell the Property to be used as a McDonald’s.

22. Due to the Property’s location and specifications, national and local fast-casual and sit-down restaurants are uninterested in the site, while fast-food restaurants, including McDonald’s, have showed interest.

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<sup>4</sup> Ordinance No. 23-09 is publicly available and can be accessed at: <https://www.castlepinesco.gov/wp-content/uploads/2023/08/Ordinance-23-09-Approving-the-Parkway-Plaza-Planned-Development-Plan-Case-No.-RPD-2022-002-And-Amending-The-Official-Zoning-Map.pdf>.

<sup>5</sup> Section 15 is publicly available and can be found at: <https://www.castlepinesco.gov/wp-content/uploads/2019/09/SECTION-15-PD-PLANNED-DEVELOPMENT-DISTRICT.pdf>.

<sup>6</sup> The “Use Matrix” for the Parkway Plaza Planned Development is publicly available and can be found at: [https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2021082/B\\_-\\_Use\\_Matrix.pdf](https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2021082/B_-_Use_Matrix.pdf).



## II. SITE PLAN APPLICATION PROCESS

23. Before a McDonald's can be constructed and operated on the Property, the City requires an application for a site improvement plan to be submitted pursuant to the procedures in Section 27.

24. Paragraph 2702 of Section 27 requires an approved site improvement plan before a building permit is issued.

25. The Planning Commission evaluates all site improvement plan applications under the following criteria in Paragraph 2703.01 of Section 27 (the "Approval Standards"):

- a. The SIP supports the goals and objectives of the City of Castle Pines Comprehensive Plan; and
- b. The SIP is consistent with the City of Castle Pines Subdivision Ordinance and the development and use standards of the City of Castle Pines Zoning Ordinance and Planned Development, as applicable; and
- c. The SIP complies with and is responsive to the overall intent and vision embodied in the City-adopted Mixed-Use Design Guidelines, as determined by the City; and
- d. The SIP complies with the City's technical standards and requirements including the City of Castle Pines Roadway Design & Construction Standards Manual; City of Castle Pines Storm Drainage Design & Technical Criteria Manual; and City of Castle Pines Grading, Erosion and Sediment Control (GESD) Manual; and
- e. The SIP furthers the public health, safety and welfare of the community.

26. The Comprehensive Plan was updated and adopted by the City Council in 2021.<sup>7</sup>

27. Generally, the Comprehensive Plan sets forth the community's vision for the next 20 years based on a framework of five community interests: (1) parks, recreation, and amenities; (2) economic development; (3) housing; (4) transportation; and (5) land use and growth management.

28. The Comprehensive Plan notes that "[m]any community members mentioned the need for more retail, service, and restaurant options."

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<sup>7</sup> The Comprehensive Plan can be found at: [https://www.castlepinesco.gov/wp-content/uploads/2021/07/Castle-Pines-Comprehensive-Plan-Update\\_web-quality.pdf](https://www.castlepinesco.gov/wp-content/uploads/2021/07/Castle-Pines-Comprehensive-Plan-Update_web-quality.pdf).

29. Written comments to the Comprehensive Plan include that the City should “[b]ring in more business. How is it we have only 1 fast food drive through in this entire town!!??”

30. The stakeholder summary in the Comprehensive Plan notes that the City “[n]eed[s] more restaurants and breakfast places.”

31. Section 27 does not provide any details on how a SIP can further the public health, safety, and welfare of the community.

32. If an applicant is unsatisfied with the Planning Commission’s decision to deny a site improvement plan, the applicant may appeal that decision to the City Council within 30 days pursuant Paragraph 2704.06.03 of Section 27.

33. Pursuant to Section 27, the City Council conducts de novo review of a decision on a site improvement plan as part of a public hearing. The City Council likewise reviews whether a site improvement plan complies with the Approval Standards in Paragraph 2703.01 of Section 27.

### **III. THE PROJECT**

34. The proposed development on the Property involves the construction of an approximately 3,671 square-foot McDonald’s fast-food restaurant with a dual drive-through, parking, landscaping, and associated utilities (the “Project”).

35. The SIP proposes that the restaurant building will be located in the center of the site, with the drive-up windows facing Castle Pines Parkway and the primary entrance and parking lot facing the interior of the site.

36. The SIP also proposes a landscape plan containing both deciduous and evergreen trees and shrubs that offer various heights, colors, and seasonal interest that helps soften and shade the site and provide buffering and screening of the building and drive-through.

37. The proposed building would have a maximum height of 23 feet, 9½ inches. The building would incorporate 360-degree design principles, as well as transparency at the ground level. The Project pays particular attention to the north and west elevations, which are the most visible elevations from Castle Pines Parkway and nearby residential neighborhoods.

38. The SIP provides that the building’s color palette will consist of two shades of gray with wood grain and black accents. Design materials include concrete lap siding, metal panels, aluminum battens, and aluminum awnings. The building offers roof plane changes and a combination of vertical and horizontal architectural treatments. The north and west elevations feature horizontal woodgrain battens that frame the building, and a concentration of windows that contribute to a balanced visual aesthetic. A rendering of the proposed building, which was included in the applicant’s presentation to City Council, is below:



#### **IV. PROCEEDINGS BEFORE THE PLANNING COMMISSION**

39. On behalf CP Commercial and McDonald's USA, LLC, Kimley Horn submitted the SIP application to the Planning Commission on August 21, 2023. The SIP was given the case number SIP-2023-003.

40. The external referral comment period for the SIP application was from September 22, 2023, to October 13, 2023. Requests for comments were sent to various agencies, including Castle Pines North Metropolitan District, North Pine Vistas Metropolitan District, Cherry Creek Basin Water Quality Authority, Plum Creek Water Reclamation Authority, South Metro Fire Rescue, Douglas County Sheriff's Office, Douglas County Government, CORE, Xcel Energy, Black Hills Energy, Comcast, Lumen, Century Link, Castle Valley HOA, and Castle Pines North HOA 1.

41. Of the 11 agencies that returned comments, 10 were either "no comment" or included comments that were technical in nature and reconciled through an iterative review process.

42. The exception was a comment by Castle Pines North HOA 1, which opposed the application based on concerns about hours of operation, incompatible building design, increased traffic, increased crime risk, increased litter and trash, and light, noise, and smoke pollution, among other things.

43. A courtesy notice advising of the SIP application was mailed to surrounding landowners within 300 feet of the Property. The City received 147 comments from residents regarding the application. Most of the comments opposed the SIP, voicing concerns over the brand of fast-food restaurant and those concerns shared by Castle Pines North HOA 1. A few

comments supported the application because it would provide a new fast-food restaurant option for residents.

44. After reviewing the application, referral agency comments, applicant responses, and the City staff report, the Planning Commission denied the SIP in a 5-2 vote on March 28, 2024.

## **V. APPEAL TO THE CITY COUNCIL**

45. A written notice of appeal of the Planning Commission's decision to the City Council was filed on April 17, 2024.

46. Written notices and posted notices advising of the SIP's public hearing before the City Council were executed in conformance with Paragraphs 2705.01 and 2705.02 of Section 27.

47. Before the public hearing, City staff analyzed each criterion in Paragraph 2703.01 of Section 27 and provided staff opinions.

48. City staff opined that the SIP meets each of the approval criterion, including that the SIP supports the goals and objectives of the Comprehensive Plan and that the SIP furthers the public health, safety, and welfare of the community.<sup>8</sup>

49. Based on these findings, City staff recommended that the City Council approve the SIP.

50. A public hearing on the SIP was held before the City Council on May 28, 2024. Roughly 100 citizens attended, and about 25 testified.

51. At the public hearing, representatives of McDonald's and Kimley-Horn, as well as legal counsel, presented the Project to the City Council. A copy of the PowerPoint presentation, which was submitted to the City Council, is attached as **Exhibit 1**.

52. The presenters explained that a fast-food establishment is an allowed use under the Property's zoning.

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<sup>8</sup> Links to the City staff's recommendations, as well as other material before the City Council, can be accessed here: [https://castlepines.granicus.com/DocumentViewer.php?file=castlepines\\_5260be6ddb23aa9e08614ab7c06f6b5e.pdf&view=1](https://castlepines.granicus.com/DocumentViewer.php?file=castlepines_5260be6ddb23aa9e08614ab7c06f6b5e.pdf&view=1). The hearing packet before the City Council can be found here: [https://castlepines.granicus.com/DocumentViewer.php?file=castlepines\\_9d34d32b9618d9020b90cbeaff536cae.pdf&view=1](https://castlepines.granicus.com/DocumentViewer.php?file=castlepines_9d34d32b9618d9020b90cbeaff536cae.pdf&view=1).

53. The presenters also described the site’s location, building renderings, site access, and setbacks, planned landscaping, lighting, sounds, and building elevations, and how the features all meet the applicable standards.

54. As part of the presentation, the presenters described how a proposed large storage facility acts as a transitional buffer between the McDonald’s and the neighboring residential area.

55. The City previously approved the site improvement plan for the storage facility, which meant that it concluded that the storage facility complied with the Comprehensive Plan and its land use goal of ensuring that the building was compatible with the surrounding natural and built environment.

56. The presenters further detailed how a traffic study prepared for the SIP application (the “Parkway Plaza Trip Generation Assessment”) compared with a prior traffic study prepared for the Lagae Family Trust Parcel, dated May 14, 2020 (the “Lagae Family Trust Parcel Traffic Impact Analysis”), which was submitted as part of the Parkway Plaza Planned Development.

57. Rick Engineering prepared both traffic studies. The two traffic studies covered trip generation for the same larger development, which includes the Property.

58. The City had previously accepted the Lagae Family Trust Parcel Traffic Impact Analysis, which analyzed the total overall traffic for the entire planned urban development (“PUD”) area, when it approved the Parkway Plaza Planned Development. The analysis was based on then-current assumptions that the parcel would be developed to include a recreation center, a city hall, and commercial retail.

59. The Parkway Plaza Trip Generation Assessment prepared specific to the SIP concluded that there would be less traffic (approximately 869 daily trips) based on trip generation under the current master development proposed uses than the previously approved uses for the PUD.

60. The assessment further found that while the proposed McDonald’s would generate traffic around the parcel, it would generate *less* traffic around the parcel than had previously been contemplated—and approved—by the City.

61. The presenters then described how the SIP satisfies the Approval Standards.

62. As to supporting the goals and objectives of the Comprehensive Plan, the presenters explained, among other things, that a site improvement plan that meets all of the technical requirements of the City’s zoning requirements is compatible with the Comprehensive Plan because the zoning code requirements, by definition, implement the Comprehensive Plan.

63. The presentation also quoted from the Comprehensive Plan the statement that “[f]uture development may be viewed more positively as residents start to see the benefits and how additional tax revenue can provide for new amenities and infrastructure investment.”

64. As to further the public health, safety, and welfare of the community, the presenters described how the question before the City Council is not whether the proposed use (*i.e.*, a fast-food restaurant) furthers the public health, safety, and welfare, but whether the SIP does so.

65. Nonetheless, most of the public comment and a majority of the City Council’s questions and comments centered on the Project’s use or preexisting issues, rather than the SIP itself.

66. For example, residents and councilmembers expressed their concern that a McDonald’s would increase crime in Castle Pines because it would attract customers who are not Castle Pines residents, and it would employ people who are not Castle Pines residents.

67. In particular, one resident expressed her concern that McDonald’s employees, who she referred to as “these people,” would be from outside Castle Pines because she did not believe that Castle Pines residents would be willing to work at McDonald’s.

68. This same resident expressed her concern that “transients” would enter Castle Pines to patronize McDonald’s.

69. Similarly, Councilmember Deborah Mulvey raised a litany of concerns, many of which relate to *the use* of the property (*i.e.*, fast food), not the SIP, or were unrelated to whether the SIP met the Approval Standards. For example, Councilmember Mulvey asked whether McDonald’s planned to build an indoor or outdoor playground and whether McDonald’s intended to install a sign on an I-25 exit sign (advertising that there is a McDonald’s at this exit).

70. As for Councilmember Mulvey’s concerns that arguably relate to the SIP, none of the concerns were actually stated as grounds for denying McDonald’s’ application. For example, Councilmember Mulvey asked questions about what size of tree McDonald’s would be willing to plant along its frontage, why McDonald’s planned to use metal materials in its construction rather than stone, why McDonald’s had scrapped plans for a patio, and whether large-profile vehicles, like RVs, would be able to access McDonald’s.

71. The City Council, though, had learned that the SIP did not include plans for a patio because of its potential to attract non-customers to the location.

72. Another councilmember, Roger Hudson, raised concerns primarily related to traffic, crime, and 24-hour operation.

73. Residents also voiced concerns related to the possibility that McDonald’s would be open 24 hours per day. While McDonald’s’ operator stated that he would like to operate 24

hours per day at this location, and there is no code or other applicable restriction on hours, he would be adjusting the hours of operation based on demand following opening of the restaurant.

74. As to traffic, numerous residents raised concerns with *preexisting* traffic concerns related to a Montessori school in the area.

75. Specifically, residents voiced their concern about cars that “queue” on Castle Pines Parkway—which abuts the parcel where the McDonald’s would go—and that additional traffic attributable to McDonald’s could aggravate this already-existing problem.

76. The residents’ concerns fail to recognize that any development of the Property would contribute additional traffic.

77. Following presentations by City staff, public comment, questions and answers, and rebuttal by McDonald’s team, the City Council began its deliberations.

78. During deliberations Councilmember Roger Hudson asked whether McDonald’s would be willing to agree to a condition of approval limiting operating hours. McDonald’s asked for the opportunity to confer, and the City Council conferred with its attorney in executive session regarding its authority for such a condition.

79. When the City Council returned from executive session deliberations, Councilmember Chris Eubanks began the deliberation by moving to deny the appeal; Councilmember Hudson, who had asked for the condition limiting hours, seconded the motion.

80. Councilmember Eubanks’ stated reason for moving to deny the SIP was concerns related to traffic and the possibility of an increase in crime.

81. Councilmember Hudson stated that he had no problem with McDonald’s but was concerned with traffic and whether McDonald’s would affect Castle Pines status as a “walkable city.”

82. Councilmember Mulvey stated that she had “no reason to question that [the second, third, and fourth approval criteria] are largely if not fully met,” but stated that her concern was that the McDonald’s would not further the “public health, safety, and welfare” of Castle Pines residents and that she was having trouble determining whether the McDonald’s would support the Comprehensive Plan’s goals and objectives. In support of her objection, Councilmember Mulvey read from the Comprehensive Plan, seemingly to highlight various provisions that she believed conflicted with one another and the Project.

83. For example, Mulvey noted that while the Comprehensive Plan specifically approves fast food restaurants, it also encourages the development of “unique” and “high-end” restaurants.

84. Councilmember Ron Cole raised concerns about the potential for traffic around the McDonald's, as well as the possibility that people might order food through Uber Eats or Door Dash, thereby further aggravating the traffic problem. Mr. Cole also wondered how McDonald's delivery trucks would be able to maneuver on the roads and in McDonald's parking lot.

85. Mayor Pro Tem Ben Price did not raise additional concerns; instead, he said he agreed with his fellow councilmembers' concerns.

86. In contrast, Councilmember Geoff Blue stated that he favored approving the SIP, that he felt the Council was improperly scrutinizing design aspects of the McDonald's, and that he believed that if the plan was to build a Chick-fil-A—rather than a McDonald's—that there would not have been so much community opposition.

87. Councilmember Mulvey spoke again, noting that the SIP may satisfy the objectives of the Comprehensive Plan but conflicted with Castle Pines' strategic plan.

88. City staff interjected, explaining to Councilmember Mulvey that the Council should not consider whether the SIP conflicted with the strategic plan because it was not part of the Approval Standards.

89. Mayor Tracy Engerman agreed with Councilmember Blue, noting that she believed the SIP had satisfied the requisite criteria and that while she agreed traffic is a concern at the proposed location, traffic had been—and would continue to be—a problem irrespective of whether the McDonald's is built. She cautioned against denying the SIP on the basis of increased traffic because any future application would propose development that would increase traffic, regardless of its use or location in that area of Castle Pines.

90. Ultimately, in contradiction to the City staff's findings and the applicant's presentation, the City Council disagreed with the City staff recommendation and denied the SIP in a 5-2 vote.

91. To summarize:

- a. Councilmembers Eubanks and Hudson both cited traffic and safety as the basis for their position, and found that the SIP did not further the public health, safety, and welfare;
- b. Councilmember Mulvey agreed, reiterating the concerns related to traffic and safety, but then read aloud various portions of the Comprehensive Plan that she believed conflicted with others—including provisions irrelevant to McDonald's' site plan, e.g., fresh food production, “unique and higher-end businesses,” “upscale multi-family housing,” etc. Most of these concerns have nothing to do with the application before the City Council, and those that



arguably do relate to the proposed use of the land (i.e., a McDonald's) rather than the SIP;

- c. Councilmember Cole expressed that he did not believe the traffic study, and that "common sense" dictated that the McDonald's would create problematic traffic issues; and
- d. Mayor Engerman and Councilmember Blue both stated that they believed the SIP met the criteria, and that the traffic issues cited by neighbors and councilmembers pre-date any McDonald's.

92. After the public hearing, the City Council adopted Resolution No. 24-39 (the "Resolution"), which states that the City Council denied the SIP on two grounds: (1) the SIP's failure to support the applicable goals and objectives of the Comprehensive Plan; and (2) that the SIP does not further the public health, safety, and welfare of the community.

93. As to the first ground, the Resolution cites "the public testimony, the nature of drive-through use, and the lack of outdoor eating spaces."

94. These are complaints about the proposed use—a fast-food restaurant—and not the SIP.

95. Although the Resolution cites land use goals from the Comprehensive Plan in support, reliance on these goals conflicts with the City's prior approval of the adjacent storage facility.

96. As to the second ground, the Resolution cites several perceived flaws with the commissioned traffic study:

- a. The traffic study is flawed in that it relies on 2011 data and doesn't consider traffic from door dash and other food delivery services.
- b. While the traffic study relies on traffic engineering models, there should be additional consideration or rationale of the model in relation to actual driving patterns. As one Councilmember noted, the traffic study does not take into account that drivers will not travel all the way to the roundabout but will make a U-turn on Lagae Road in conflict with the shopping center across the street.
- c. Although the traffic study considers the road network, it doesn't consider the school uses surrounding the site which are relevant to traffic concerns and public safety.
- d. The traffic study also does not account for delivery trucks, fire trucks, and their ability to access the site.

e. The traffic study does not account for employee parking.

97. None of these perceived flaws are reasons to deny the SIP.

98. First, the traffic study does, in fact, account for employee parking, consider the road network, and consider traffic from food delivery services.

99. Second, City Council cited no evidence that the traffic study's methodology was flawed. Certain councilmembers simply did not agree with it or refused to accept it.

100. Third, the City Council previously approved the Parkway Plaza Planned Development application for the site. "[W]hether the intended land use would create traffic congestion or burden the existing road network" is one of the approval criteria for planned development rezoning in Paragraph 1503 of Section 15.

101. Fourth, these concerns relate to preexisting traffic issues that will be present irrespective of who eventually develops the parcel and/or are solely attributable to the proposed use (fast-food) rather than the SIP.

102. The Resolution did not mention that specific traffic concerns identified by City Council and residents, such as U-turns and accidents, were already present in the area, nor that City staff had already accepted the traffic study as meeting all its requirements and did not raise the alleged flaws during the months-long review and referral process for the SIP.

103. The City Council expressly did not deny the SIP based on other three criteria in the Approval Standards.

104. In fact, because the City had previously found that the Parkway Plaza Planned Development complied with the requirements in the Comprehensive Plan and that the SIP met the requirements of that planned development and the technical site improvement plan requirements (i.e., the other criteria), it logically follows that the SIP supports the Comprehensive Plan.

## **VI. THIS APPEAL FOLLOWS PURSUANT TO C.R.C.P. 106(a)(4) AND APPLICABLE CITY ORDINANCES**

105. Under Paragraph 2704.06.03 of Section 27, the City Council's decision on review of a site improvement plan is a "final action" with the City Council exercising its quasi-judicial functions.

106. The City Council's final action therefore can be appealed pursuant to C.R.C.P. 106(a)(4).

107. CP Commercial has no plain, speedy and adequate remedy otherwise provided by law. The City Council's decision effectively prevents using the Property for fast-food restaurant

use. In fact, if a site improvement plan for the Property can be denied simply because the use would increase traffic, however infinitesimally, then no development could ever occur on the Property.

108. CP Commercial files this appeal in this district court within the 28 days provided in C.R.C.P. 106(b).

**CLAIM FOR RELIEF**  
**JUDICIAL REVIEW PURSUANT TO C.R.C.P. 106(a)(4)**

109. CP Commercial incorporates herein by reference all allegations set forth above.

110. The City Council’s de novo review of the SIP is a quasi-judicial action that required the City Council to decide whether the SIP met the criteria in Paragraph 2703.01 of Section 27.

111. A local governing body will be found to have abused its discretion where there is no competent evidence on the record to support its decision. Where the decision of the lower body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority, it will be an abuse of discretion and the decision overturned. *See Rangeview, LLC v. City of Aurora*, 381 P.3d 445 (Colo. App. 2016).

112. The City Council exceeded its jurisdiction and abused its discretion in denying the SIP based on whether the proposed *use* (*i.e.*, a fast-food restaurant) supports every applicable goal and objective in the Comprehensive Plan or furthers the public health, safety, and welfare.

113. The City Council, as well as many of the public commenters, objected to putting a fast-food restaurant, and specifically McDonald’s, on the Property.

114. The applicable criteria require the City Council to instead determine whether the *site improvement plan* supports the goals and objectives of the Comprehensive Plan and furthers the public health, safety, and welfare.

115. The proposed use—a fast-food restaurant—is a permitted use under the zoning and is irrelevant to the City Council’s review.

116. The City Council’s decision to deny the SIP is devoid of competent evidence in support and thus constituted an arbitrary and capricious exercise of authority.

117. Moreover, the City Council exceeded its jurisdiction in denying the SIP because at least one councilmember compared the SIP to Castle Pines’ strategic plan—as opposed to its Comprehensive Plan—in evaluating whether the SIP met the Approval Standards.

118. The City Council’s stated reasons for rejecting the SIP under the first criterion—“the public testimony, the nature of drive-through use, and the lack of outdoor eating spaces”—

do not support denying the SIP on the grounds that the SIP does not support the applicable goals and objectives of the Comprehensive Plan.

119. Likewise, the City Council's decision to deny the SIP on the ground that the traffic study contained perceived flaws and a McDonald's would increase traffic does not support denial.

120. CP Commercial has no other plain, speedy and adequate remedy otherwise provided by law.

121. CP Commercial has or will suffer injury in fact as a direct and proximate cause of the improper actions and/or omissions by the City Council.

122. Indeed, the City Council's decision may render the Property unusable for any purpose if an increase in traffic is sufficient reasons to deny a site improvement plan.

123. Therefore, because the City Council exceed its jurisdiction and abused its discretion, the City Council's decision should be vacated and remanded with instructions that the City Council must grant the appeal and approve the SIP.

#### **PRAYER FOR RELIEF**

WHEREFORE, CP Commercial requests this Court enter judgment as follows:

- a. Vacate and reverse the City Council's decision denying the SIP, and remand to the City Council with instructions that the City Council must grant the appeal and approve the SIP; and
- b. For such other and further relief this Court deems just and proper.

DATED this 25th day of June, 2024.

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