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| <p>PITKIN COUNTY, COLORADO: DISTRICT COURT Court Address: Pitkin County Courthouse 506 East Main Street Aspen, Colorado 81611</p> <p>Phone Number: 970-925-7635</p> <hr/> <p>Plaintiff(s): STONYWOOD TRUST, by and through Henry I. Lowe, Trustee</p> <p>Defendant(s): PITKIN COUNTY, COLORADO, acting by and through the BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY; ESTATE OF MARVIN A. TILLMAN; and ALAN D. MOORE, personal representative of the Estate of Marvin Tillman</p> | <p>COURT USE ONLY</p> |
| <p>The Honorable James B. Boyd</p> | <p>Case Number: P 08 CV 122</p> <p>Division 3</p> |
| <p style="text-align: center;">JUDGMENT</p> | |

This matter comes before the Court on Plaintiff Stonywood Trust's Complaint under C.R.C.P. 106(a)(4). The Court has considered the briefs of the parties and the pertinent record, and the Court is otherwise fully advised. Therefore, the Court finds, concludes and orders as follows:

1. This case is a dispute between neighbors about Pitkin County's approval of an "Activity Envelope" as a vested property right on the property of one of the neighbors. Resolution of the dispute turns upon the boundaries imposed by law on Pitkin County to determine the sufficiency of an application for a vested activity envelope and to limit the vested rights created by the approval of an activity envelope. Plaintiff (Stonywood) argues Pitkin County accepted an insufficient application and then granted broad rights not supported by the application and not permitted by law. Defendants the Estate of Marvin Tillman and the Estate's personal representative Moore (collectively Tillman) argue Pitkin County had the authority to accept a narrow application and then granted a permissible vested right similarly narrow in its scope. Although Defendant Pitkin County did not participate in the briefing, the County asserts the same position in its Answer.

2. Stonywood and Tillman own adjacent parcels of land in Pitkin County.

3. Tillman applied to Pitkin County for the approval of an Activity Envelope on the Tillman Property. Tillman's application was processed by Pitkin County's Community

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Development Department. The Application was heard and approved with a modification by a Pitkin County Hearing Officer. Stonywood appealed the Hearing Officer's approval to the Pitkin County Board of County Commissioners (BOCC) and to the Pitkin County Board of Adjustment (BOA). The BOA declined to act upon the appeal. The BOCC denied Stonywood's appeal except (1) to overturn the Hearing Officer's modification, (2) to remove from the Activity Envelope land where the slope exceeds 30 degrees and (3) to impose floor area and height restrictions on any residence which might be built. The BOCC otherwise upheld the approval. In its Amended Complaint, Stonywood alleges errors, abuses of discretion and acts exceeding jurisdiction were committed by the Community Development Department, the Hearing Officer, the BOA and the BOCC. Stonywood filed this Rule 106(a)(4) action to challenge the Resolution of the BOCC denying Stonywood's appeal and generally approving the decision of the Hearing Officer.

4. Under C.R.C.P. 106(a)(4), judicial review is limited to determining whether or not the governmental entity "exceeded its jurisdiction or abused its discretion." The factual record is limited to the evidence before the governmental entity. C.R.C.P. 106(a)(4)(I).

5. To the extent the issue turns upon the proper application of law, the court's review is de novo although the court "may defer" to an agency's construction of the law which governs the agency's actions. City of Commerce City v. Enclave West, Inc., 185 P.3d 174, 178 (Colo. 2008).

6. An abuse of discretion can occur if the governmental agency misapplies the applicable law. The normal rules of statutory construction apply even when the review includes consideration of the provisions of local law. The court must apply the plain meaning of a statute or code. In the event of any ambiguity, the court must defer to the agency's interpretation of meaning so long as that interpretation "has a reasonable basis in law and is warranted by the record." Shupe v. Boulder County, 230 P.3d 1269, 1272 (Colo. App. 2010).

7. Stonywood alleges a lengthy list of errors or abuses by the County:

- a. The County granted a vested right without a required site specific development plan. The Activity Envelope cannot qualify as such a plan because
 - i. the size of the Activity Envelope as further constrained by setback requirements is too small for the proposed use;
 - ii. Tillman submitted no drainage study or plan; and
 - iii. Tillman submitted no proposed driveway alignment or grading plan.

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- b. The County did not follow the applicable requirements of the County's land use code and regulations:
 - i. In the manners noted above, the County did not enforce requirements of the County's Land Use Code and Application Manual.
 - ii. The County approved a vested Activity Envelope with a condition that Tillman obtain any variances that might be required, a condition incompatible with the existence of a site specific development plan.
 - iii. As an apparent alternative to the above, the County's approval has the effect of granting a variance, a variance granted in an improper manner.
- c. The County did not ensure that the Activity Envelope complied with the applicable "land use objectives, standards, and the Comprehensive Plan." Stonywood Opening Brief, p. 3.
- d. To any extent the County might have had authority to waive certain requirements, no valid waiver occurred.

8. There is no dispute in the record that the County approved the Activity Envelope absent some submissions required, at least in the first instance, by the Land Use Code and the Application Manual. Presentations by the Community Development Department, Transcript Exhibit 50, as quoted in the briefs and the determination of the Hearing Officer, Exhibit 32, establish the County's conclusion that the omitted matters would be better addressed at a later time when Tillman might propose a particular structure for construction. The resolution of this case turns upon whether or not this postponement is permitted by the applicable law.

9. State law mandates that a vested property right attach to a local government's approval of a "site specific development plan." § 24-68-103(1)(a), C.R.S. However, state law defers to the local government the definition of what qualifies for vesting as such a plan—as long as the definition is "consistent" with the statute. *Id.*

10. The statutory definition of site specific development plan is a plan "describing with reasonable certainty the type and intensity of use for a specific parcel . . ." § 24-68-102(4)(a), C.R.S. Local government has the authority to establish the requirements for an application for approval of a vested plan.

11. That which vests is the right to develop and use property "under the terms and conditions of the site specific development plan." § 24-68-103(1)(c.), C.R.S.; Pitkin County Land Use Code (LUC) § 11-10.

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12. In Pitkin County, an “activity envelope” is a designated portion of a parcel of land “within which all development must occur.” LUC § 11-10. If so desired by a landowner, an application for an activity envelope can be treated as a site specific development plan to which a vested right can attach. LUC § 2-20-170(a)(2), (b)(1)(e).

13. A vested right in an activity envelope can be subject to conditions as set forth in a conditional approval of the activity envelope. LUC § 2-20-170(a)(1).

14. Under the Land Use Code, the approval of an activity envelope does not create a presumption that the house size approved in the activity envelope will be approved in the required site plan review. LUC § 2-30-20(g)(3). Even when an activity envelope is approved, a landowner remains required to obtain site plan approval, to comply with other land use code requirements “not considered” when the envelope was approved, and to obtain a development permit. LUC § 7-10-50(f).

15. The Land Use Code identifies eleven “development standards” to be reviewed when an activity envelope approval is sought separately from a site plan approval. LUC § 7-10-50(g), table 7-1. These include the slope, drainage and grading requirements about which Stonywood complains.

16. To complete an application, a landowner must comply with Pitkin County’s Land Use Application Manual (the Application Manual) except to the extent the manual’s requirements are “waived or modified” by the Community Development Department “pursuant to this Land Use Code.” LUC § 2-20-40. For any mandatory standard of the Land Use Code to be waived or varied, the deviation must be made “expressly.” LUC § 11-10.

17. For a decision to be “express”, it must be direct, firm and explicit. Merriam Webster On-Line Dictionary, “express”. A matter is explicit if it is “fully revealed or expressed without vagueness, implication or ambiguity.” *Id.*, “explicit”.

18. Under the Application Manual, the Community Development Department can modify that which must be submitted “during the pre-application conference.” Application Manual § 1.

19. The Application Manual authorizes the Community Development Department to modify submission requirements in the “pre-application conference.” The Land Use Code allows the Department to waive or modify requirements of the Manual as authorized in the Land Use Code. The Land Use Code allows standards to be waived or varied so long as the deviation

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is express. This ability to waive or vary standards is not limited to actions of the Community Development Department; nothing in the Code precludes a hearing officer or the BOCC from making an express waiver or variation. The Court concludes that, when read together, these provisions of the Land Use Code and Application Manual create ambiguity about what requirements may be waived and when they may be waived. Therefore, the Court must defer to Pitkin County's interpretation as long as it has "a reasonable basis in law and is warranted by the record."

20. Here, the Community Development Department determined Tillman's application was complete, Exhibit 3, even though the Department recognized the application omitted items required by the Land Use Code and Application Manual. The Community Development Department concluded the items about which Stonywood complains were better deferred until the site plan approval process. The Community Development Department representative stated to the Hearing Officer the following:

I don't mean to say that these [activity envelope submission requirements] aren't the things that are listed here and required, but I guess as we work with it, we sort of look at it as what really makes sense in terms of dividing up this process of an activity envelope versus site and land review.

Transcript, Exhibit 50, bates page 144, lines 5-10.

21. The Hearing Officer specifically found "information purported [sic, purportedly] required by the application manual has not been provided . . ." Consistent with the hearing statement of the Department representative, the Hearing Officer concluded the missing information "is more appropriately submitted as part of site plan review." The Officer then concluded the missing information "is not required for this application." Exhibit 32, Recital 6.

22. The BOCC denied Stonywood's appeal and, with the exceptions noted above, approved the decision of the Hearing Officer.

23. This sequence of evidence and decision making is sufficient for the County to treat the additional submission requirements as waived or varied. A rational basis exists to conclude the deviation was express. For the County to process Tillman's application as it did was neither arbitrary nor capricious. Nor did the County's approach exceed its jurisdiction.

24. Stonywood argues the County, in effect, has granted Tillman a variance from the County's setback requirements. If true, such a grant was made without following the variance

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requirements of local law, including referral to the Board of Adjustment. If true, the County's decision could also violate § 24-68-102(4)(b), C.R.S., which removes a variance from the scope of a site specific development plan. Both the determination of the Hearing Officer and the BOCC Resolution expressly require that any future proposed development, if proposed within setback requirements, is subject to Tillman obtaining a variance from the Board of Adjustment. Both documents also confirm that approval of the Activity Envelope does not guarantee a variance will be granted. Hearing Officer Determination, Exhibit 32, resolution para. 5; BOCC Resolution, Exhibit 54, resolution para. 5. Pitkin County has not granted a variance. Therefore, no violation of the Land Use Code or the statute has occurred. As noted above, the approval of a site specific development plan can be granted with conditions. That is what has occurred in this case. With respect to setback requirements or variance requirements, the County has not exceeded its jurisdiction and has not acted arbitrarily or capriciously.

25. As noted above, the statutory definition of site specific development plan is a plan "describing with reasonable certainty the type and intensity of use for a specific parcel . . ." § 24-68-102(4)(a), C.R.S. The 5-page decision of the Hearing Officer imposes many restrictions on any future development and requires future compliance with many requirements of the Land Use Code, including the requirements waived or varied at the present activity envelope stage. The 5-page Resolution of the BOCC does the same. The County's approval of the Activity Envelope with conditions is consistent with the statutory requirement of reasonable certainty. Therefore, the County's decision was neither arbitrary nor capricious and did not exceed the County's jurisdiction.

26. Stonywood argues the County erred because it did not ensure compliance with the County's Comprehensive Plan. The particular issues identified by Stonywood are scenic view and rural character provisions of the applicable plans. As with other issues, the determination of the Hearing Officer and the Resolution of the BOCC defer these issues to a future site plan review stage but mandate, at that future stage, compliance with scenic view and rural character requirements. Determination of Hearing Officer, Exhibit 32, resolution para. 2; BOCC Resolution, Exhibit 54, resolution para. 2. For the same reasons discussed on other issues above, the Court concludes the County had the authority to defer these issues to a future application process and to make future compliance a condition of the approved Activity Envelope. This decision did not exceed the jurisdiction of the County and was not made in an arbitrary or capricious manner.

27. By deferring certain matters to site plan review, the County did not grant Tillman a vested right on those matters. Rather, the County removed those matters from the scope of the issues considered and from the approval granted. The County thereby narrowed the scope of the

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vested rights obtained by Tillman within his Activity Envelope. The result of the County's actions on the Tillman application is that the scope of the vested rights obtained by Tillman are far narrower than they could have been if the County had required compliance with all provisions in the Land Use Code and Application Manual related to an activity envelope. This approach is permitted by both the state statute and local law.

28. Judgment is entered in favor of Defendants and against Plaintiff on Plaintiff's Complaint. The BOCC Resolution, Exhibit 54, is affirmed.

29. Due to the entry of this order, the conference set for August 25, 2010, is vacated.

Done on August 21, 2010.

BY THE COURT



District Court Judge