DISTRICT COURT, EAGLE COUNTY STATE OF COLORADO 885 Chambers Ave P.O. Box 597 Eagle, CO 81631 Telephone: (970) 328-6373 **Plaintiff:** BARBARA AND JACK BENSON, CRAIG FOLEY, and GREG JOHNSON **Defendants:** EAGLE COUNTY, COLORADO, acting by and through its BOARD OF COUNTY COMMISSIONERS, and BEHRINGER HARVARD CORDILLERA, LLC Bryan R. Treu, Reg. No. 29577 Beth Oliver, Reg. No. 35575 Eagle County Attorneys' Office P.O. Box 850 Eagle, Colorado 81631 Telephone: (970) 328-8685 SARAH J. BAKER P.C. Sarah Baker, #32806 P.O. Box 4551 Eagle, CO 81631 Telephone: (970) 331-0799 Fax: (866) 597-4823 E-mail: sbaker@sbakerpc.com	▲ COURT USE ONLY ▲ Case Number: 2016CV30361 Consolidated With: 2016CV30363

DEFENDANTS' REPLY IN SUPPORT OF JOINT MOTION TO STRIKE AMENDED REPLY BRIEF OF PLAINTIFFS BARBARA AND JACK BENSON, CRAIG FOLEY AND GREG JOHNSON

Defendants Eagle County, Colorado acting by and through the Board of County Commissioners ("**Board**") and Behringer Harvard Cordillera, LLC ("**BHC**"), by and through their respective undersigned counsel, submit the following reply in support of their Joint Motion

to Strike Reply Brief of Plaintiff Barbara and Jack Benson, Craig Foley and Greg Johnson (the "**Motion**").

BACKGROUND

The Motion seeks relief from this Court striking any and all references in the Amended Reply Brief of Plaintiffs Barbara and Jack Benson, Craig Foley and Greg Johnson ("**Brief**") to matters outside of the certified record on appeal ("**Record**") in this proceeding for certiorari review.[1] Specifically, the Motion seeks to strike references to (1) the alleged mailed notice provided by the Board in advance of its approval of the PUD in 2009 (the "**2009 Notice**"); (2) testimony of Tom Ragonetti in the separate matter of *Wilner v. Behringer Harvard Cordillera*, Case No. 16-CV-02999-RBJ (D. Colo. 2017); and (3) depositions and sworn declarations taken well after the Hearing as part of the Benson Parties' now-dismissed Rule 57 claim.

The Benson Parties failed to include or by neglect did not make the 2009 Notice a part of the Record when they had the opportunity to do so. It was incumbent upon them to create their record, and having failed to do so, should not now be heard to complain. With respect to the testimony of Mr. Ragonetti and the depositions and sworn declarations, such testimony occurred after the Hearing and is therefore factually irrelevant to the review by this Court. This Court's certiorari review is limited to the Record before the Board on appeal and the Bensons are precluded from reaching outside of that Record for new matters not previously brought before the Board.

[1] In the event this Court enters an order in favor of the Board and BHC on the merits of the Benson Parties' and the Cordillera Parties' Rule 106(a)(4) claims, this Motion is moot.

ARGUMENT

Plaintiffs have offered no sufficient reason why the action they brought under C.R.C.P. 106(a)(4) for this Court's certiorari review should, or even can, be excused from the clear and strict mandate of the Colorado Rules of Civil Procedure that "[r]eview **shall be limited** to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, **based on the evidence in the record before the defendant body or officer**." C.R.C.P. 106(a)(4)(I) (emphasis added).[2]

Contrary to the Benson Parties' argument, even judicial notice is restricted in the context of a C.R.C.P. 106 case. This Court's ability to take judicial notice is limited to what is contained in the Record:

> Having held in *County Court v. People ex rel* … that "the limit of the power of the reviewing court is to ascertain from that record [the certified record] alone whether the inferior tribunal regularly pursued its authority," we limit our judicial notice to what is contained in the record and in accordance with sections of the Code of Civil Procedure ... and cases construing them, base our decision on the record before us.

Bd. of Adjustment of City and Cnty of Denver v. Handley, 95 P.2d 823, 826 (Colo. 1939) (applying a previous version of C.R.C.P. 106(a)(4)); *see also E&G Inc. v. San Miguel County Bd. of Com'rs*, 541 P.2d 86, 88 (Colo. App. 1975) (courts are not empowered to take judicial notice of zoning resolution and rules and regulations adopted pursuant thereto in a certiorari

[2] *See also Hazelwood v. Saul,* 619 P.2d 499, 501 (Colo. 1980) ("In a certiorari proceeding pursuant to C.R.C.P. 106(a)(4), the district court's review is limited to a review of the record before it. Introduction of new testimony is not appropriate."); *see also Bd. of Cnty. Comm'rs of Jefferson Cnty. v. Simmons,* 494 P.2d 85, 86 (Colo. 1972) ("In the certiorari proceedings the trial court was confined to a review of the record of the hearings before the Board."); *Higby v. Bd. of Cnty. Comm'rs of El Paso Cnty.,* 689 P.2d 635, 639 (Colo. App. 1984) ("a C.R.C.P. 106(a)(4) certiorari zoning review is limited to a review of the record only"); *Famularo v. Bd. Of Cnty. Comm'rs of Adams Cnty.*, 505 P.2d 958 (Colo. 1973) ("We find no merit in plaintiff's argument that the trial court erred by confining the hearing on the claim brought pursuant to C.R.C.P. 106(a)(4) to a review of the record of the proceedings before the defendants and the Adams County Planning Commission.")

action under C.R.C.P. 106). The cases cited by the Benson Parties in support of their argument for more liberal judicial notice are cases that are not certiorari review cases and are therefore not relevant.

The 2009 Notice is not in the Record for only one reason: because the Benson Parties did not introduce it when they participated in the appeal of the Director's Interpretation to the Board. Given the Benson Parties' apparent belief that the 2009 Notice should define the purpose and scope of the PUD, it was incumbent upon them to raise that argument during the appeal. That appeal process afforded the Benson Parties numerous opportunities to introduce the 2009 Notice and any other evidence they believed relevant for the Board's consideration. But the Benson Parties elected to take advantage of none of these opportunities to present or argue the 2009 Notice to the Board. Whatever the merits of the Benson Parties' argument might be, it is a fundamental principle that arguments are not permitted to be addressed for the first time in a certiorari proceeding. *See Boatright v. Derr*, 919 P.2d 221, 227 (Colo. 1996).

It is the absence of the Benson Parties' own diligence that has created their present need to reach outside the Record. In such circumstances, a litigant will not be heard to complain. *See Love v. Klosky*, 2016 WL 4699109, *3 (Colo. App. 2016) ("We presume that the trial court's findings and conclusions are supported by the evidence when the appellant has failed to provide a complete record on appeal. Therefore, without the full record on the issue, we cannot properly determine whether the trial court correctly decided the issue … and must uphold its determination."); *see also Hock v. New York Life Ins. Co.*, 876 P.2d 1242, 1252 (Colo. 1994) (moving party will not be permitted to take advantage of his own failure to designate pertinent portions of the transcript as part of the record). The absence of evidence in the record to support

their argument is a problem solely of the Benson Parties' own making, and one from which this Court cannot provide relief.

The Benson Parties' argument that if the Record is inadequate, this Court is bound to consider the evidence under C.R.C.P. 57 is simply not correct. The line of cases cited by the Benson Parties provides that certiorari review under C.R.C.P. 106 may be inadequate where persons have not had prior notice of a rezoning hearing and have not participated in the action they are challenging. *See, e.g., Norby v. City of Boulder*, 577 P.2d 277, 280 (Colo. 1978). That is not the case here; the Benson Plaintiffs are challenging the Board's 2016 decision on appeal, an action that they indisputably had notice of and participated in. *See* **ECG-000128:7-000130:21** (Hearing testimony of Plaintiff Barbara Benson); *see also* **ECG-000987-000988** (correspondence to Board from Plaintiff Greg Johnson, June 12, 2016). The Benson Parties failed to place the 2009 Notice in the Record or argue the relevance they believed it had even when they did participate, and thus the Court's review cannot include it. A party's failure to include material in the Record does not then give that party another bite at the apple under a different rule of civil procedure.

The Benson Parties accuse the Board of denying them the opportunity to introduce their evidence, but that also simply is not the case as the County points out in its Amended Answer Brief.[3] The Benson Parties rely on an October 3, 2016 email whereby the Cordillera Parties sought permission to introduce certain additional evidence and argument <u>two weeks after the public hearing was conducted and closed</u>, and also after the Board had already voted unanimously to uphold the Director's interpretation. *See* **ECG-000177:15-23** ("So we're going

[3] *See* Defendant Eagle County, Colorado's Amended Rule 106 Consolidated Answer Brief, p.20-24.

to now close public comment … and the presentation."); *see also* **ECG-000193:7-21**. In effect, the Cordillera Parties were asking the Board to reopen and reconsider the appeal. To argue that they "had no opportunity to submit rebuttal evidence" to appellee BHC's September 12, 2016 submittal (**ECG-000785**) ("**BHC Submittal**") is patently inaccurate. *Benson Parties' Opposition to Motion*, p. 4.

The Benson Parties offer no justification for their failure to timely address the arguments raised by the BHC Submittal. Had the Bensons wanted to provide additional evidence or raise the 2009 Notice issue in response to the BHC Submittal, they could have done so with written public comment prior to the September 20, 2016 Hearing, at the Hearing during the presentation of argument, during the period set aside for rebuttal arguments, or during public comment at the Hearing. **ECG-0000097, ECG-000118:16-000170:23**; *see also* Board Resolution No. 2016-079, 6th Whereas clause, **ECG-000856** (specifying the evidence the Board considered in reaching its decision, including written presentations, oral presentations, email correspondence and public comment). Moreover, the Benson Parties had ample opportunity to present evidence as to the intent of the PUD and the language identifying the 34 standalone uses permitted on the Lodge Parcel and, of those who attended and spoke in great detail at the Hearing, they did. **ECG-000017:10-25; ECG-000030:7-13; ECG-000034:4-14; ECG-000046:9-24; ECG-000059:1-16; ECG-000061-62; ECG-000067:20-25; ECG-000091; ECG-000094:20-25; ECG-000095:1-2.**

At no time were the Benson Parties prevented or restricted from raising their argument and introducing evidence concerning the 2009 Notice; rather the Benson Parties either knowingly or by neglect chose not to put on this portion of their case when they had the

opportunity to do so. Clearly, the Board could and would have considered and addressed the argument had the Benson Parties timely raised it. But they did not and are now constrained by the consequences of that failure.

CONCLUSION

The principles underlying C.R.C.P. 106's assurance—and obligation—that certiorari appeals be determined based solely on the evidence in the record before the lower body prevents the introduction of the evidence the Board and BHC seek to strike from the Benson Parties' Brief. This Court should grant the Motion for the reasons set forth therein and above.

Respectfully submitted August 4, 2017.

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CERTIFICATE OF MAILING

I certify that on August 4, 2017, a true and correct copy of the **DEFENDANTS' REPLY IN SUPPORT OF JOINT MOTION TO STRIKE AMENDED REPLY BRIEF OF PLAINTIFFS BARBARA AND JACK BENSON, CRAIG FOLEY AND GREG JOHNSON** was served via ICCES e-filing to:

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