

<b>Matter:</b> Appeal of the Director's Interpretation that the Proposed Use of the Lodge and Village Center Parcels Represent a Use-By-Right in the Cordillera PUD	
<b>Appellants:</b> Cordillera Property Owners Association Cordillera Metropolitan District	
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<b>POSITION STATEMENT IN SUPPORT OF APPEAL OF  DIRECTOR'S INTERPRETATION</b>	

The Cordillera Property Owners Association, Inc. (the "Association") and the Cordillera Metropolitan District (the "District"), through above referenced counsel, hereby submit this Position Statement in support of the appeal of the Association and District to the Board of County Commissioners ("County Commissioners") of the Managing Director of Community Development's (the "Director") interpretation regarding uses allowed on the Lodge Parcel and Village Center Parcel pursuant to the Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document (the "Cordillera PUD").

### **INTRODUCTORY STATEMENT**

This Position Statement is submitted on behalf of the Association and District. The Association and District are aware that the County Commissioners have received communications and materials from individual residents of Cordillera, which individuals may be members of the Association and/or residents of the District. The Association and District wish to emphasize that not all such views represent those of the Association and District, which speak only through their elected leaders and attorneys.

Cordillera was created as a comprehensive planned resort residential community. The Association and District believe no individual should be excluded from the Cordillera resort residential community. In fact, this Appeal results in large part because the Association and District seek to avoid the effective segregation of the Lodge Parcel from the Cordillera community. To be clear, the motivation of the Association and District in pursuing this appeal is not to discriminate against anyone for any reason. The Association and District welcome everyone to Cordillera.

## SUMMARY

This matter arises from the stated intention of Concerted Care Group Management's ("CCG") to operate an addiction treatment center and a related residential rehabilitation facility on the Lodge and Village Center Parcels in the Cordillera PUD.

The Cordillera PUD is a 59-page document that provides a broad list of 34 different "Permitted Uses" allowed on the Lodge and Village Center Parcels. However, neither an addiction treatment center nor a residential rehabilitation facility are listed as "Permitted Uses." CCG was therefore left to seek a private meeting with the Director to pursue an administrative interpretation that CCG's proposed use somehow fits within the following Permitted Use:

**Medical Offices/Facilities – limited to clinic and outpatient facilities for non-critical care**, including without limitation, for outpatient plastic surgery and other cosmetic procedures.

The Director's interpretation that this clause permits CCG's proposed use of the Lodge and Village Center Parcels – to the exclusion of the rest of the Cordillera residential community – is wrong on a number of counts:

**First**, neither an addiction treatment center nor a residential rehabilitation facility are listed as "Permitted Uses" in the Cordillera PUD. CCG was thus left to seek an administrative interpretation that its Proposed Use somehow fits within the definition of a medical facility "limited to clinic and outpatient facilities for non-critical care." While the Director determined CCG's Proposed Use represents a "clinic," examination of the Proposed Use demonstrates that it fails to actually meet the plain-language meaning of a "clinic." Similarly, the Proposed Use is not limited to providing only "non-critical care."

**Second**, the Director ignored the broader question posed by CCG's application. Even if CCG's Proposed Use somehow fits within the definition of a Permitted Use, there is nothing in the Cordillera PUD that allows CCG to convert the entire Lodge Parcel into a single use excluding the Cordillera residential community from the Lodge Parcel, while also segregating the guests of the Lodge Parcel from the remainder of the Cordillera community. The Director pointed to no provision in the Cordillera PUD that even arguably authorizes such a result. There is none. To the contrary: any use of the Lodge Parcel that entirely excludes Cordillera residents is inconsistent with the Permitted Uses of the Lodge Parcel; any use segregating the Lodge Parcel from the Cordillera community violates the central purpose and intent of the Cordillera PUD; and, any use excluding the Cordillera community violates the mandate of the Cordillera PUD that the Lodge Parcel must be treated as a "social gathering place" for the Cordillera community.

**Third**, the Director's interpretation is entirely predicated on a phrase ("limited to clinic and outpatient facilities for non-critical care") that the Director himself acknowledged was susceptible to alternate constructions. Under those circumstances, Colorado law required the Director to ascertain the legislative intent behind the 2009 amendment of the Cordillera PUD. The Director failed to do so. The legislative intent behind the 2009 PUD amendment, when properly considered, demonstrates that the uses sought by CCG were never intended to be Permitted Uses, that the Lodge Parcel was never intended to be amputated from the Cordillera community in the manner sought by CCG and that, ultimately, the purpose of the 2009 PUD amendment was to benefit the entire Cordillera community and not one single party (as CCG seeks here in order to maximize revenue from its proposed business venture).

**Fourth**, the conversion of the Lodge and Village Center Parcels from a community gathering place to a private compound – accessible only to CCG clients and off-limits to all other Cordillera residents – effectively amputates the resort (the Lodge and Spa at Cordillera) from the Cordillera resort residential community. Such a result will deprive Cordillera residents of access to the very facilities that were critical to their decisions to purchase their properties in Cordillera. This clearly represents a significant alteration of the character of those parcels and there is no credible argument to the contrary. If this fundamental change to Cordillera is to be authorized, the Cordillera PUD expressly requires that such a major change can only be accomplished only through an amendment to the Cordillera PUD. Moreover, basic fairness and due process demand that changes of this magnitude be authorized only through an open public process, not in private meetings through an administrative interpretation of an ambiguous phrase in the Cordillera PUD that was never understood to allow that result.

**Fifth**, neither this appeal by the Association and District, nor a reversal of the Director's interpretation by the County Commissioners constitute a violation of the Federal Fair Housing Amendments Act ("FHA") and the Americans With Disabilities Act ("ADA") as CCG's lawyers suggest. The County should not be intimidated by CCG's baseless threats. If the County does what is right, and reverses the Director's interpretation, the County will not violate either the ADA or the FHA. As Michael Allen, one of the preeminent experts in civil rights law, and one of this nation's primary advocates for the rights of people with disabilities, points out in his attached declaration, those federal laws are intended to promote the integration of people with disabilities into the community. They provide for access into the community, not for exclusivity within it. CCG demands exclusivity, even though it provides no evidence that exclusivity is necessary from a therapeutic perspective to promote the recovery of its clients from addiction and mental health disorders. And CCG seems to ignore the substantial medical and social sciences literature that consistently finds that therapeutic best practice supports integrating people with such disorders rather than segregating them from the broader community. CCG demands the right to exclude Cordillera residents from the Lodge Parcel not for therapeutic reasons, but so it can charge premium fees exceeding \$60,000 per month to "high net worth individuals" based on a promise of "anonymity." The ADA and FHA provide no protection for what CCG is trying to do – namely, exploiting laws intended to prevent discrimination in order for CCG to maximize its corporate profit.

**Therefore**, the County Commissioners should properly exercise their jurisdiction and discretion in order to reverse the interpretation of the Director or, at a minimum, require an amendment of the Cordillera PUD in order to properly consider possible approval of CCG's requested uses.

### **FACTUAL BACKGROUND**

#### **A. The Cordillera PUD Governs Land Use in Cordillera**

Development and land use standards for all properties in Cordillera must comply with the Cordillera PUD. *See Exhibit 1* attached for the Eleventh Amended and Restated version of the Cordillera PUD adopted effective December 21, 2009 (the "Cordillera PUD"). The Cordillera PUD was approved by the County Commissioners and the specific provisions of the Cordillera PUD supersede the Eagle County Land Use Regulations (the "Land Use Regulations"). *Id.* Accordingly, the use and development of the Lodge and the Village Center Parcels are governed by the Cordillera PUD.

The purpose of the Cordillera PUD is to: (i) set forth the "standards, restrictions and regulations which govern development and land use" within the Cordillera PUD; and (ii) incorporate any amendments to the Cordillera PUD approved by the Eagle County Commissioners. *See* Cordillera PUD at Section 1.02. In addition, the Cordillera PUD expressly provides:

Additionally, **the purpose of this [Cordillera PUD] is to insure that Cordillera is developed as a comprehensively planned resort residential community. The [Cordillera PUD] will insure the orderly and compatible development of the property.** The [Cordillera PUD] replaces the standard zoning provisions of Eagle County with site specific restrictions that are more appropriate to the specific conditions of lands contained within the development.

*Id.*, emphasis added. The Cordillera PUD also expressly mandates the intent of the Cordillera PUD:

**The Cordillera Community is intended to be a nearly self-contained resort residential community.** Cordillera will provide for a balanced mixture of residential, commercial, office, and undisturbed natural lands to **support the focus of resort residential uses.** This [Cordillera PUD] remains somewhat flexible to allow for changes and innovations in community design as the project progresses through its multi-year development schedule. These changes will be permitted only **as they remain consistent with the overall character as defined throughout this [Cordillera PUD].**

*Id.*, at Section 1.03, emphasis added.

#### **B. The Lodge and Village Center Parcels**

This matter arises from the proposed use of the Lodge Parcel and Village Center Parcel, as those parcels are defined in the Cordillera PUD. *See Exhibit 1; see also Exhibit 2* attached for an excerpt of the Cordillera PUD depicting the Lodge and Village Center Parcels, as well as an aerial photograph showing the parcels.

The Lodge Parcel was created in order to feature The Lodge and Spa at Cordillera (“**The Lodge**”) as what has long been described as the “community centerpiece” and “crowning jewel of the community.” *See Exhibit 3* attached for documents memorializing the significance of the Lodge Parcel to the Cordillera community.

The Village Center Parcel is adjacent to the Lodge Parcel and, as a result, the Cordillera PUD sets forth the intent of the Village Center Parcel as follows:

**The intent of the Village Center is to provide a focal point to the community both within a physical design context and as a social gathering place.** The proximity of the Lodge at Cordillera to the Village Center will enhance this intent. The Village Center is designed to contain the highest residential densities within Cordillera and to accommodate the widest mixture of uses. The scale of the structures are designed to create pedestrian intimacy. **The scope of the uses is intended to serve the needs of the residents, fractional interest owners and resort guests of Cordillera.** Except for fractional interest owners and Lodge guests, the Village Center is not intended to service residents outside of Cordillera.

*See Exhibit 1* at 3.01.1, emphasis added.

### **C. The Prior PUD**

Prior to December 2009, the operative version of the Cordillera PUD was the Tenth Amended and Restated version of the Cordillera PUD adopted in 2003 (the “Prior PUD”). See Exhibit 4 attached for the Prior PUD.

The Prior PUD recognized only two (2) Permitted Uses on the Lodge Parcel and 21 Permitted Uses on the Village Center Parcel. *Id.* The Prior PUD did not recognize an addiction treatment center or other similar facility as a Permitted Use on either the Lodge or Village Center Parcel. *Id.* Similarly, the Prior PUD did not recognize a residential rehabilitation facility, group home or other similar facility as a Permitted Use on either the Lodge or Village Center Parcel. *Id.*

### **D. The 2009 PUD Amendment**

In mid-2009, the owner of the Lodge and Village Center Parcels, Behringer Harvard, Inc, (“Behringer Harvard”), approached the Association regarding possible amendment of the Prior PUD. See Exhibit 5 for Affidavit of Richard Smith; Exhibit 6 for Affidavit of Elise Micati; Exhibit 7 for Affidavit of Jeffrey Hartman. Behringer Harvard sought the Association’s approval to amend the Prior PUD because the Prior PUD expressly required the approval of the Association in order to modify the Prior PUD. See Exhibit 4 at 1.05.1.

Behringer Harvard attended the regular Association meetings from July through October 2009 in an attempt to obtain the Association’s approval. See Exhibit 8 attached for Minutes of Association/District meetings. There were no “negotiations” between Behringer Harvard and the Association because the Association’s approval was discretionary and the Association was not seeking anything from Behringer Harvard. See Exhibit 6 ¶ 6. Rather, the Association sought to ensure that any amendments to the Prior PUD were in the best interest of the entire Cordillera community and not just Behringer Harvard. *Id.* The Association was motivated by the desire to help The Lodge remain an integral part of the greater Cordillera community. See Exhibit 5 at ¶ 8.

In seeking the Association’s approval, Behringer Harvard represented that its primary motivation was to effectively merge the permitted uses on the Lodge and Village Center Parcels for the purpose of allowing fractional/timeshare units that were otherwise permitted on the Village Center Parcel to be instead developed on the Lodge Parcel. See Exhibit 6 at ¶ 7. Behringer Harvard assured the Association that it did not seek to add any uses to the PUD. *Id.* Behringer Harvard assured the Association that the proposed modification of the Prior PUD would help revitalize The Lodge for the better of the overall Cordillera community. *Id.*, at ¶ 8.

In September 2009, four representatives of Behringer Harvard attended an Association meeting for the purpose of discussing the proposed amendment of the Prior PUD. See Exhibit 8. The draft PUD proposed by Behringer Harvard at that time included “Medical Offices/Facilities” as a listed use without any limitations. See Exhibit 9 for October 19, 2009 Memorandum of Jeffrey Hartman, which includes a redline draft showing revisions to the proposed amendment to the Prior PUD. The Association raised concerns regarding this proposed use and made clear that it was not willing to approve this listed use. See Exhibit 6 at ¶ 11. Behringer Harvard’s representatives assured the Association that the purpose for including such a provision was to recognize the use of limited medical procedures that were consistent with the already-existing operation of the spa at The Lodge. See Exhibit 5 at ¶ 11. Specifically, Behringer Harvard represented that it sought to modify the Prior PUD to clarify that the Lodge could provide certain services such as botox, rhinoplasty and other similar cosmetic procedures consistent with the operation of a high class spa and the then-trending concept of “medi-spas.” See Exhibit 6 at ¶ 11.

The Association requested that Behringer Harvard revise the proposed amendment to the PUD consistent with Behringer Harvard's representations regarding the limitation of medical uses to be allowed on the Lodge Parcel. *See Exhibit 7* at ¶ 9. Accordingly, the proposed amendments to the Prior PUD were revised and a new draft of the proposed amendment was presented to the Association at its October 2009 meeting. *See Exhibits 8 and 9*. The proposed PUD was specifically revised, consistent with the understanding of all parties, to narrow and constrain the initial language of the proposed amendment, so that permitted uses would be "limited to clinic and outpatient facilities providing non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures." *See Exhibit 9*. The purpose for this revision was to clarify that limited medical services consistent with the operation of a spa, such as cosmetic treatments, minor cosmetic surgery, botox treatments, colonics and other similar procedures could be offered at The Lodge's spa similar to other "destination spas" around the world. *See Exhibit 5* at ¶ 11.

This intent, and the parties' mutual understanding, was further ratified when Behringer Harvard (through its then lawyers and now CCG's current lawyers) represented the following to the County and the Cordillera community in submitting the application for the 2009 PUD Amendment:

The Amendment does not introduce new or additional density or uses to the Existing PUD, or otherwise substantively change the Existing PUD. Rather, the proposed changes include corrections to typographical errors, replacement of inaccurate Guide Maps, updates to reflect the current status of development approvals for the Lodge Parcel and the Village Center Parcel, and clarification of the treatment of the Lodge Parcel and the Village Center Parcel as a single planning parcel.

ADJACENT PROPERTIES. The Amendment will not have any effect on adjacent properties because it does not change the overall uses or densities currently contemplated in the Existing PUD.

BENEFIT. The Amendment will not confer a special benefit upon any particular person. To the contrary, it will benefit the entire Cordillera PUD and surrounding areas, as it will make the development contemplated by the Existing PUD more efficient.

*See Exhibit 10*, attached for a copy of Behringer Harvard's correspondence and application submitted on November 11, 2009.

In turn, at a hearing held on December 21, 2009, the County Commissioners expressly found that the "PUD Amendment does not propose any new or additional uses within the Cordillera PUD." *See Cordillera PUD at Resolution No. 2010-001 (at Section 2(2))*.

Accordingly, the Cordillera PUD, as amended, recognized the "Permitted Uses" on both the Lodge Parcel and Village Center Parcel included, among a large number of Permitted Uses:

**Medical Offices/Facilities – limited to clinic and outpatient facilities for non-critical care**, including without limitation, for outpatient plastic surgery and other cosmetic procedures.

*See Cordillera PUD at Sections 2.01.1 and 3.01.2*. However, consistent with the 2009 PUD Amendment, addiction treatment centers and residential rehabilitation facilities were not listed as Permitted Uses on the Lodge and Village Center Parcels. *Id.*

#### E. CCG's Proposed Purchase of the Lodge and Village Center Parcels

In 2016, Concerted Care Group Management ("CCG"), a Baltimore-based company, entered into a contract to purchase the Lodge and Village Center Parcels from Behringer Harvard.

CCG reported that it seeks to purchase the Lodge and Village Center Parcels for the purpose of operating an addiction treatment center and related residential rehabilitation facility that would feature the following (collectively, the "Proposed Use"):

- Conversion of the Lodge into a **"health, wellness and addiction treatment center"**;
- That provides **"inpatient" care** for "treatment of a variety of conditions including, but not limited to, eating disorders, alcoholism, chemical dependency, and behavioral health conditions";
- At an average stay costing **\$60,000 per month** per patient;
- Which cost includes not only paying for treatment, but also **paying for "anonymity"** because the CCG's patients "want complete anonymity";
- So CCG plans to **"provide around the clock security guards"** as they do at all their facilities, in order "to protect [the] patients" and to exclude the community;
- While **"distancing the Cordillera community** and overall community brand from the work" done by CCG.

See Exhibit 11 attached for a copy of correspondence from CCG dated May 31, 2016; see also Exhibit 12 attached for a copy of a *Vail Daily* article of June 13, 2016 (emphasis added).

#### F. CCG's Director's Original Interpretation

CCG engaged Dominic Mauriello ("CCG's Agent") as an agent to work on the CCG's behalf in working with the County. CCG's Agent contacted the Director on May 2, 2016, to schedule a meeting on behalf of CCG to discuss an interpretation of the Cordillera PUD. See Exhibit 13 attached for e-mail communications dated May 2, 2016. Despite the fact that CCG's Agent was soliciting a meeting of a public official to pursue a public determination, CCG's Agent asked to "keep the matter extremely confidential" and "on the down low." *Id.*

CCG's Agent and CCG's attorney, Thomas J. Ragonetti, Esq. ("CCG's Attorney"), met with the Director on May 26, 2016 and verbally requested that the Director issue an interpretation that the operation of an addiction treatment center and residential rehabilitation center represented a Permitted Use on Lodge and Village Center Parcels pursuant to the Cordillera PUD. See Exhibit 14 attached for an e-mail communication dated May 26, 2016. Specifically, CCG's Agent and Attorney asked the Director to provide an interpretation that CCG's Proposed Use fell within the following Permitted Use allowed on the Lodge and Village Center Parcels:

Medical Offices/Facilities – **limited to clinic and outpatient facilities for non-critical care**, including without limitation, for outpatient plastic surgery and other cosmetic procedures.

The Director concluded at that very meeting, without any further research or consideration, that CCG's Proposed Use represented a Permitted Use pursuant to this definition. *Id.*

On May 26, 2016, CCG's Agent sent the Director a summary of the language that CCG desired to see in a formal interpretation letter from the Director and requested that the Director "verify this understanding in a letter." *Id.* The Director subsequently sent CCG's Agent and CCG's Attorney a copy of the "DRAFT Cordillera Zoning Interpretation Letter" which the Director stated was being provided to the CCG representatives at CCG's suggestion. *See Exhibit 15* attached for e-mail communication from the Director dated May 27, 2016. The Director requested that CCG's Attorney provide "a once-over edit" of the draft interpretation letter before the Director finalized his interpretation. *Id.*

CCG's Attorney and CCG's Agent reviewed and approved the Director's draft interpretation letter. *See Exhibit 16* attached for e-mail communication from CCG's Attorney dated May 27, 2016 (stating "This looks fine to me. Nice job, Bob."); *see also Exhibit 17* attached for an e-mail communication from CCG's Agent dated May 31, 2016 (stating "We are fine with the letter on our end.").

After receiving CCG's approval for the language and conclusions set forth in the draft interpretation, the Director finalized and executed the interpretation letter on June 1, 2016 stating that the Director believed the Proposed Use represented a use-by-right pursuant to the Cordillera PUD on both the Lodge Parcel and the Village Center Parcel. *See Exhibit 18.* (the Director's "Original Interpretation").

On June 2, 2016, the Director spoke with the Association and District's general manager (the "Association/District General Manager") and attorney. *See Exhibit 19* attached for Affidavit of Rachel Oys. The Association/District General Manager objected to the interpretation rendered by the Director and stated her belief that the phrase "clinic and outpatient facilities for non-critical care," should be interpreted to mean that only a clinic providing outpatient services for non-critical care is permitted, and thus inpatient clinical facilities are not permitted by the PUD. *Id.* at ¶ 8. The Director acknowledged that the subject phrase was susceptible to more than one meaning – one which would not render the Proposed Use as a Permitted Use under the Cordillera PUD, and one that would render the Proposed Use as a Permitted Use. *Id.* at ¶ 9. The Director stated he elected to use the latter interpretation – the one that interpreted the Proposed Use to be a Permitted Use. *Id.*

After members of the Cordillera community began to complain about the interpretation issued by the Director, the Director asked the County Manager to "help" the County Commissioners "understand that this interpretation was not made in a vacuum" because CCG's Attorney and the County Attorney assisted in the determinations made by the Director. *See Exhibit 20* attached for e-mail communications among County officials dated June 9, 2016.

#### **G. The Association/District's Appeal of the Director's Initial Interpretation**

On June 29, 2016, the Association/District submitted its appeal of the Director's Original Interpretation. *See Appeal of Director's Interpretation* that the Proposed Use of the Lodge and Village Center Parcels Represent a Use-By-Right in the Cordillera PUD submitted to the Eagle County Administrator on June 29, 2016 (the "Original Appeal").<sup>1</sup>

CCG, though its attorneys, responded by sending the Association/District's attorney a letter suggesting there had been some unspecified violations of the FHA and ADA. *See Exhibit 21* attached for correspondence from CCG's attorneys dated July 5, 2016.

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<sup>1</sup> The Original Appeal and all exhibits referenced in the Original Appeal are hereby incorporated by this reference and shall be considered part of this Position Statement.



In addition, on July 8, 2016, CCG's attorneys sent the County Commissioners a Memorandum responding to the Association/District's Original Appeal. See Exhibit 22 attached. CCG's Memorandum again claimed violations of the FHA/ADA. *Id.*

#### **H. The Director's Current Interpretation**

Likely in response to issues raised in the Original Appeal, Behringer Harvard sent a letter to the Director dated July 7, 2016 stating that CCG's request for interpretation was made on behalf of Behringer Harvard as a landowner in Eagle County. See Exhibit 23 attached for correspondence from Behringer Harvard's attorney.

On July 11, 2016, Michele C. Larson, an individual resident of Cordillera, filed a Complaint in Eagle County District Court Case No. 16CV30213 challenging whether the Original Interpretation was properly requested and validly issued (the "Larson Litigation").

Later that day, likely in response to issues raised in the Original Appeal, Behringer Harvard's letter of July 7 and the Complaint filed in the Larson Litigation, the Director issued a new interpretation letter (the "Interpretation") that: (1) rescinded his Original Interpretation; (2) stated that he considered the Behringer Harvard letter to be a new request for interpretation made by Behringer Harvard; and (3) issued, effective as of that date, a new interpretation in response to the request from Behringer Harvard, which interpretation was identical to the Original Interpretation. See Exhibit 24 attached for e-mail communication and correspondence from the Director.

The Association/District appealed the Director's current Interpretation on August 9, 2016. See Appeal of Director's Interpretation that the Proposed Use of the Lodge and Village Center Parcels Represent a Use-By-Right in the Cordillera PUD submitted to the Eagle County Administrator on August 29, 2016 (this "Appeal"). This Position Statement is submitted in support of the Appeal.

### **ARGUMENTS IN SUPPORT OF APPEAL**

#### **I. THE PROPOSED USE IS NOT A "PERMITTED USE" ON THE LODGE AND VILLAGE CENTER PARCELS**

CCG seeks to use the Lodge and Village Center Parcels for the purposes of operating both an addiction treatment center and a related residential rehabilitation facility. The Director erred in determining that this Proposed Use is a permitted use pursuant to the Cordillera PUD. The Cordillera PUD does not list either an addiction treatment center or a residential rehabilitation facility in the list of "Permitted Uses" in the Cordillera PUD. CCG was thus left to seek an administrative interpretation claiming that its Proposed Use somehow fits within the definition of a medical facility "limited to clinic and outpatient facilities for non-critical care." However, as set forth below, the Proposed Use does not meet not meet the definition of a "clinic" under local or state law. Similarly, the Proposed Use is not limited to providing "non-critical care."

##### **A. The Cordillera PUD's List of "Permitted Uses" Does Not Include Either an Addiction Treatment Center or a Residential Rehabilitation Facility**

The Cordillera PUD lists 34 specific uses which represent the "Permitted Uses" on the Lodge and Village Center Parcels. See Cordillera PUD §§ 2.01.1 and 3.01.2. The list of Permitted Uses is broad in the scope of uses allowed (34 allowed uses), and makes clear that the wide scope of uses allowed "is intended to serve the needs of the residents, fractional interest owners and resort guests of Cordillera" alike. *Id.*, at § 3.01.1.

Significantly, despite this broad scope of allowed uses, the Cordillera PUD does not list an addiction treatment center or any type of facility for the treatment of alcoholism, chemical dependency, eating disorders, behavioral health conditions or other addictions as a Permitted Use. *Id.* Similarly, the Cordillera PUD does not list a residential rehabilitation facility or group home as a Permitted Use. Accordingly, under the plain language reading of the Cordillera PUD, neither the addiction treatment center nor the residential rehabilitation facility proposed by CCG is a Permitted Use on the Lodge or Village Center Parcels.

**B. The Proposed Use Does Not Meet the Definition of a “Clinic” Under Local or State Law**

As set forth above, neither an addiction treatment center nor a residential rehabilitation facility is contained within the list of “Permitted Uses” in the Cordillera PUD. CCG was thus left to seek an administrative interpretation that its Proposed Use somehow fits within the definition of a medical facility “limited to clinic and outpatient facilities for non-critical care.” While the Director determined CCG’s Proposed Use represents a “clinic,” examination of the Proposed Use demonstrates that it fails to actually meet the plain-language meaning of a “clinic.”

The operation of an addiction treatment center falls within the definition of a “Hospital” under the Eagle County Land Use Regulations:

HOSPITAL means an institution providing primary health services, medical or surgical care to persons, primarily inpatients, suffering from illness, disease, injury, deformity and other abnormal physical or mental conditions, and including, as an integral part of the institution, related facilities such as laboratories, outpatient facilities or training facilities.

See Land Use Regulation § 2-110, an excerpt of which is attached as Exhibit 25 (emphasis added).<sup>2</sup>

A licensed physician who has established and operated medical facilities in Vail, Avon and Gypsum (Dr. Laurence W. Brooks) specifically opined that **CCG’s Proposed Use meets this definition of a “Hospital” under Eagle County regulations.** See Exhibit 26 at ¶ 9, for Affidavit of Laurence W. Brooks. Similarly, an attorney who has practiced health care law in Colorado since 1983 and also holds a Master of Science in Health Administration (Ellen E. Stewart, M.S.H.A. and J.D.) opined that certain services proposed by CCG **also meet the definition of a “Psychiatric Hospital” under Colorado law.** See Exhibit 27, for Report of Ellen E. Stewart, M.S.H.A. and J.D. at p. 4.

The fact that CCG’s Proposed Use meets the definition of a “Hospital” under local law, as well as a “Psychiatric Hospital” under state law, demonstrates that the Proposed Use is not a “clinic.” Nonetheless, as a physician who established and operated multiple medical clinics in Eagle County, Dr. Brooks specifically opined that, the Proposed Use does not meet the definition of a clinic in any event. See Exhibit 26. Similarly, Ms. Stewart specifically opined that the Proposed Use cannot meet the definition of a clinic under Colorado law. See Exhibit 27.

Accordingly, the Proposed Use fails to meet the definition of a “clinic” under local and state law and thus is not a Permitted Use in the Cordillera PUD in the manner determined by the Director.

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<sup>2</sup> The term “clinic” is not defined in the Land Use Regulations.

### C. The Proposed Use is Not Limited to “Non-Critical Care”

The Director’s Interpretation somehow concluded, perhaps in reliance upon erroneous assertions by CCG, that the Proposed Use would only provide “non-critical care.” This determination was simply wrong.

CCG’s Proposed Use features an inpatient facility for substance abuse treatment. *See Exhibit 24.* According to a licensed physician who treats patients dealing with withdrawal symptoms arising from addictions to alcohol, cocaine, benzodiazepines, heroine, painkillers and other substances, the operation of an inpatient treatment facility for alcohol or substance addiction “**must necessarily have a critical care component because a certain number of patients in these facilities will require critical care.**” *See Exhibit 28* attached for the Affidavit of David H. Goldstein, M.D. at ¶ 10 (emphasis in original).

As described by Dr. Goldstein, although patients may enter an inpatient treatment facility in a non-critical condition, certain patients will encounter life-threatening symptoms during withdrawal (such as seizures, cardiac arrest, suicidal thoughts) that will require critical care. *Id.* at ¶¶ 3, 8. This is particularly true for an inpatient facility which operates at Cordillera, which Dr. Goldstein noted is isolated from other medical facilities, thus making critical care even more a necessary part of the Proposed Use. *Id.* ¶ 14.

Accordingly, the Proposed Use simply cannot meet the definition of a medical facility providing “non-critical care” as determined by the Director and thus cannot be considered to be a Permitted Use in the Cordillera PUD.

## II. THE DIRECTOR’S INTERPRETATION FAILED TO CONSIDER THE ENTIRE PUD AND GIVE EFFECT TO ALL OF ITS PARTS

The Director was asked to provide an interpretation of the Cordillera PUD. In doing so, the Director was obligated to interpret the entire Cordillera PUD in harmony and give effect to all portions of the Cordillera PUD. *A.B. Hirschfeld Press, Inc. v. City & Cty. of Denver*, 806 P.2d 917, 920 (Colo. 1991) (in interpreting a comprehensive legislative scheme, we must give meaning to all portions thereof and construe the statutory provisions to further the legislative intent).

In this case, the Director considered only one question in reaching his Interpretation – does CCG’s proposed addiction treatment center somehow fit within the definition of one of the listed Permitted Uses? However, even if the Proposed Use somehow fits within the definition of one of the Permitted Uses, there is still another question that must be answered – does the Cordillera PUD allow CCG to convert the entire Lodge Parcel into a facility providing only the Proposed Use to the exclusion of others, and, most importantly, to the exclusion of the entire Cordillera community? And, if so – what provision of the Cordillera PUD authorizes that result?

The Director failed to address the secondary questions or otherwise give effect to all portions of the Cordillera PUD. There is simply no provision in the Cordillera PUD that authorizes the owner of the Lodge Parcel to operate a facility segregating the Lodge Parcel from the rest of the Cordillera community and excluding the entire Cordillera residential community from access to the parcel.

To the contrary, when all portions of the Cordillera PUD are considered, it is clear that no use should be allowed to consume the entire Lodge Parcel to the exclusion of the Cordillera residents because: (a) any use of the Lodge Parcel that entirely excludes Cordillera residents is inconsistent with the Permitted Uses of the Lodge Parcel; (b) any use segregating the Lodge Parcel from the Cordillera community violates the central purpose and intent of the Cordillera PUD; and (c) the Lodge Parcel must be treated as a “social gathering place” for the Cordillera community.

**A. Any Use of the Lodge Parcel That Entirely Excludes Cordillera Residents is Inconsistent With the Permitted Uses of the Lodge Parcel**

The Cordillera PUD lists 34 “Permitted Uses” on the Lodge and Village Center Parcels. *See* Cordillera PUD §§ 2.01.1 and 3.01.2. The Cordillera PUD does not state that any single use can be offered to the benefit of only the Lodge Owner and to the exclusion of the entire Cordillera community. *Id.* To the contrary, the Cordillera PUD makes clear that **the wide scope of allowed uses “is intended to serve the needs of the residents, fractional interest owners and resort guests of Cordillera” alike.** *Id.*, at § 3.01.1 (emphasis added).

The large number of Permitted Uses is therefore clearly intended to provide the Lodge Parcel with the flexibility to offer a wide range of services to support the resort residential uses in the community. The Permitted Uses do not allow the Lodge Parcel to be converted into a segregated facility providing only one of those uses to the exclusion of others, and certainly not to the exclusion of the community. In fact, such a result would simply not represent a Permitted Use under the Cordillera PUD. For example, the Cordillera PUD lists “Utility Facilities” as a Permitted Use – but it was never intended that the Lodge Parcel could be walled off from the community and converted into a power plant as a use-by-right. Similarly, the Cordillera PUD lists “Educational Facilities” as a Permitted Use – but it was never intended that the Lodge Parcel could be converted into a private boarding school that foreclosed other uses and walled out the Cordillera residential community.

The Permitted Uses are intended to support the Lodge Parcel in its role as a central resort facility in this comprehensively planned resort residential community. The idea that the Lodge could be converted entirely into any single use (such as a power plant, boarding school, or segregated treatment center) to the exclusion of others and to the exclusion of the community it was intended to serve, is simply inconsistent with the Permitted Uses allowed in the Cordillera PUD.

Accordingly, CCG’s Proposed Use on the Lodge Parcel that acts solely to serve the needs of CCG’s clients to the exclusion of the Cordillera residents is simply inconsistent with the Permitted Uses of the Lodge Parcel and thus the Director failed to interpret the entire Cordillera PUD.

**B. Any Use Segregating the Lodge Parcel from the Cordillera Community Violates the Expressly Stated Purpose and Intent of the Cordillera PUD**

Furthermore, any proposed use of the Lodge Parcel that segregates the Lodge Parcel from the Cordillera community violates the purpose and intent of the Cordillera PUD as expressly set forth in the Cordillera PUD. *See* Cordillera PUD at §§ 1.02 and 1.03. The central purpose and intent for the creation of the Cordillera PUD are clear and unambiguous:

*Section 1.02 Purpose.* ...the purpose of this [Cordillera PUD] is to insure that Cordillera is developed as a comprehensively planned **resort residential community**.

*Section 1.03 Intent.* The Cordillera Community is intended to be a nearly self-contained resort residential community. Cordillera will provide for a balanced mixture of residential, commercial, office, and undisturbed natural lands **to support the focus of resort residential uses**.

*Id.*, emphasis added.

In direct contradiction of this stated Purpose and Intent of the Cordillera PUD, CCG proposes to convert The Lodge into a compound that would provide “complete anonymity” to its clients and exclude

the Cordillera community. See Exhibit 12. CCG publicly stated that “anonymity” is built into the \$60,000 average monthly cost it will charge its clients. *Id.* To provide this anonymity, CCG intends to “provide around the clock security guards” as CCG does at its other facilities. *Id.*

This Proposed Use is simply not intended “to support the focus of resort residential uses” in Cordillera, nor is the Proposed Use intended “to support the focus of the resort residential community.” See Cordillera PUD at §§ 1.02 and 1.03. To the contrary, by CCG’s own admission, the Proposed Use seeks to “distance” The Lodge from the Cordillera community. See Exhibit 11. Ultimately, the Proposed Use seeks to serve CCG’s clients to the exclusion of the members of the resort residential community. *Id.* Indeed, CCG has confirmed that, were it to obtain approval for its Proposed Use, it would bar Cordillera residents from any access whatsoever to the Lodge Parcel.

The Proposed Use therefore violates the express Purpose and Intent of the Cordillera PUD and, because the Director failed to consider these provisions of the Cordillera PUD, the Director failed to interpret the entire Cordillera PUD in harmony and give effect to all portions of the Cordillera PUD.

### C. The Lodge Parcel Must be Treated as a “Social Gathering Place” for the Cordillera Community

The County Commissioners’ Resolution approving the Cordillera PUD expressly recognized “that previously approved density is transferable between the Lodge Parcel and the Village Center Parcel, and that **the permitted uses are the same for the Lodge Parcel and the Village Center Parcel, effectively treating these adjacent areas as a single planning parcel.**” See Exhibit 1 at the third recital, emphasis added.

The Cordillera PUD expressly mandates that the intent of these Permitted Uses “is to provide a focal point to the community” to serve as “**a social gathering place**” that is “**intended to serve the needs of the residents, fractional interest owners and resort guests of Cordillera.**” See Cordillera PUD § 3.01.1, emphasis added. Accordingly, the Lodge Parcel must be treated as a “social gathering place” to serve the needs of both Cordillera residents and guests of the Lodge. *Id.*

CCG’s Proposed Use, however, seeks to wrongfully eliminate the Lodge Parcel as a “social gathering place” for the residents and guests of Cordillera. See Exhibit 12. Instead, CCG’s Proposed Use seeks to create a secured compound in order to provide anonymity to CCG’s clients – which, by CCG’s own admissions will “distance” and exclude the remainder of the Cordillera community. *Id.*, see also Exhibit 11. However, CCG cannot on one hand seek to obtain the benefit of all of the Permitted Uses arising from the adoption of the Cordillera PUD (including, namely, the claimed Permitted Use for medical facilities) while, on the other hand, refusing to recognize that the allowance of such uses on the Lodge Parcel also requires the Lodge Parcel to be used as a “social gathering place.”

Furthermore, while CCG claims that other areas now serve as the focal point, or sole social gathering place for the Cordillera community (see Exhibit 22 at p. 4-5), the Cordillera PUD does not mandate that the Lodge Parcel must serve as “the social gathering place” but rather only as “a social gathering place” for the Cordillera community. See Cordillera PUD at §3.01.1, emphasis added. Similarly, while CCG claims that declining membership numbers indicate that The Lodge no longer serves as the social gathering place (see Exhibit 22 at p. 4-5 and its Exhibit B), CCG’s own evidence demonstrates that the Lodge Parcel is actually used as “a social gathering place” for the residents of the

Cordillera community – just as its use is mandated pursuant to the express terms of the Cordillera PUD.<sup>3</sup> See Cordillera PUD at §3.01.1.

CCG’s attempt to wrongfully convert the Lodge Parcel from a “social gathering place” to a secured compound is in clear conflict of the express terms of the Cordillera PUD and, because the Director failed to consider this wrongful result, the Director failed to interpret the entire Cordillera PUD in harmony and give effect to all portions of the Cordillera PUD.

### III. THE DIRECTOR’S INTERPRETATION IS INCONSISTENT WITH THE LEGISLATIVE INTENT OF THE 2009 PUD AMENDMENT

The Director’s Interpretation is entirely predicated on his determination that CCG’s Proposed Use falls within of the meaning of the phrase “limited to clinic and outpatient facilities for non-critical care” and thus the Proposed Use represents a Permitted Use. See Exhibit 24, citing Cordillera PUD §§ 2.01.1 and 3.01.2.

The Director, however, acknowledged that this phrase was susceptible to more than one interpretation. See Exhibit 19 for Affidavit of Rachel Oys at ¶ 9. Specifically, the Director said it was reasonable to read the phrase to mean either: (a) the Cordillera PUD requires medical facilities to provide both “clinic and outpatient” non-critical care – and thus the Proposed Use cannot be a Permitted Use since CCG proposes inpatient care and not outpatient care; or (b) the Cordillera PUD permits medical facilities to be either a “clinic” or an “outpatient” facility – and thus the Proposed Use may be a Permitted Use if the Proposed Use meets the definition of a clinic. *Id.* Without explanation, the Director elected to use the latter interpretation that a clinic may represent a Permitted Use even if it offers inpatient care. See Exhibit 24.

The Director’s determination in this regard was erroneous.<sup>4</sup> Regardless, because the phrase “limited to clinic and outpatient facilities for non-critical care” was susceptible to alternate constructions (as acknowledged by the Director), **the Director was obligated to ascertain the legislative intent behind the 2009 PUD Amendment.**<sup>5</sup> *Farmers Ins. Exch. v. Bill Boom Inc.*, 961 P.2d 465, 469-470 (Colo. 1998) (when statutory language is susceptible to alternate construction, any interpretation of the statutory language must ascertain the legislative intent).

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<sup>3</sup> The Association and District dispute the accuracy of CCG’s data. Nonetheless, as set forth above, such data demonstrates that the Lodge Parcel is being used as a “social gathering place” as mandated by the Cordillera PUD.

<sup>4</sup> If the intent of the limiting provision was to allow either clinics or outpatient facilities, then the provision should have stated ‘limited to clinics or outpatient facilities for non-critical care.’ Instead, the provision, as written, specifies “clinic and outpatient facilities” – with the intention that permitted facilities must be both clinical in nature and limited to outpatient care.

<sup>5</sup> Furthermore, the specific terms “clinic” and “non-critical care” are subject to determination of legislative intent because they are undefined in the Cordillera PUD and the Land Use Regulations and are also subject to multiple interpretations. See *Martin v. Montezuma–Cortez Sch. Dist. RE–1*, 841 P.2d 237, 246 (Colo.1992) (“in the absence of express definitions . . . statutory terms [may] be construed according to the various interpretive rules governing the construction of statutes”). See also *Fogg v. Macaluso*, 892 P.2d 271 (Colo. 1995) (because the term “emergency” was not defined in a statute, the court was obligated to determine the legislative intent to determine what constitutes an “emergency”).

The legislative intent behind the 2009 PUD Amendment, when properly considered, demonstrates the following:

- The Prior PUD did not list medical facilities/offices, with or without limitation, as a Permitted Use on the Lodge Parcel (nor did the Prior PUD include an addiction treatment center or a residential rehabilitation facility as a Permitted Use). See Exhibit 4 at § 2.01 and 3.01.2.
- Behringer Harvard approached the Association in mid-2009 about possible amendment of the Prior PUD because the Prior PUD expressly required the Association's approval in order to modify the Prior PUD. See *id.* at 1.05.1.
- The Association's approval was discretionary and the Association's motivation was to ensure that any amendments to the Prior PUD were in the best interest of the entire Cordillera community and not just Behringer Harvard, and to help The Lodge remain an integral part of the greater Cordillera community. See Exhibit 5 at ¶ 8 and Exhibit 6 at ¶ 9.
- Behringer Harvard assured the Association that it did not seek to add any uses to the PUD and that it sought to amend the Prior PUD to help revitalize The Lodge for the better of the overall Cordillera community. See Exhibit 5 at ¶¶ 7-9, Exhibit 6 at ¶ 13 and Exhibit 7 at ¶¶ 10-12.
- Behringer Harvard initially proposed a draft PUD that included the term "Medical Offices/Facilities" as a listed Permitted Use without any limitations. See Exhibit 9 at the redline draft showing revisions to the proposed amendment to the Prior PUD. The Association refused to approve this listed use. See Exhibits 6 at ¶¶ 11-12 and Exhibit 7 at ¶¶ 8-10. Behringer Harvard assured the Association that Behringer Harvard sought to include this Permitted Use to clarify that the spa at The Lodge could provide certain services such as botox, rhinoplasty and other similar cosmetic procedures consistent with the operation of a high class spa and the then-trending concept of "medi-spas." See Exhibit 6 at ¶¶ 11-12 and Exhibit 7 at ¶¶ 8-10.
- The draft PUD was therefore revised, based upon the representations of Behringer Harvard and consistent with the understanding of all parties, to limit medical offices/facilities "to clinic and outpatient facilities providing non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures." *Id.* The purpose for this revision was to clarify that limited medical services consistent with the operation of a spa, such as cosmetic treatments, botox, colonics and other similar procedures could be offered at The Lodge's spa similar to other "destination spas" around the world. See Exhibit 5 at ¶¶ 10-12, Exhibit 6 at ¶ 12 and Exhibit 7 at ¶ 9.
- Behringer Harvard never expressed any intention to operate an inpatient treatment center, let alone convert the entire Lodge Parcel to such a facility to the exclusion of the Cordillera community. See Exhibit 5 at ¶ 14, Exhibit 6 at ¶¶ 14-15 and Exhibit 7 at ¶ 12. The Association never would have approved any such change to the PUD. *Id.*

This intent, and the parties' mutual understanding, was further ratified when Behringer Harvard (through its then lawyers and now CCG's current lawyers) represented the following to the County and the Cordillera community in submitting the application for the 2009 PUD Amendment:

**The Amendment does not introduce new or additional density or uses to the Existing PUD, or otherwise substantively change the Existing PUD.** Rather, the proposed changes include corrections to typographical errors, replacement of inaccurate Guide Maps, updates to reflect the current status of development approvals for the Lodge Parcel and the Village Center Parcel, and clarification of the treatment of the Lodge Parcel and the Village Center Parcel as a single planning parcel.

**ADJACENT PROPERTIES. The Amendment will not have any effect on adjacent properties** because it **does not change the overall uses or densities** currently contemplated in the Existing PUD.

**BENEFIT. The Amendment will not confer a special benefit upon any particular person. To the contrary, it will benefit the entire Cordillera PUD and surrounding areas,** as it will make the development contemplated by the Existing PUD more efficient.

See Exhibit 10, emphasis added.

Now, in direct conflict with the clear legislative intent of the 2009 PUD Amendment: CCG seeks to convert the Lodge Parcel into a secure compound for its special benefit (financial gain through a high-priced business model where, by CCG's own admission, anonymity is built into the price); to the detriment of adjacent property owners and the entire Cordillera residential community (complete exclusion from the Lodge Parcel); all in order to pursue a use (a segregated addiction treatment center and residential rehabilitation facility) that Behringer Harvard never proposed and the Association did not approve.

For CCG and Behringer Harvard (and their lawyers) to now contend that the 2009 PUD Amendment authorizes such a major change to the Cordillera community is more than disingenuous. The 2009 PUD Amendment was never intended to allow the operation of CCG's Proposed Use, let alone any use that would convert the entire Lodge Parcel to a facility excluding the entire Cordillera community.

In summary, the Director failed to consider the legislative intent of the 2009 PUD Amendment and consideration of such intent demonstrates that the Proposed Use is entirely inconsistent with the purpose of the 2009 PUD Amendment.

#### **IV. THE PROPOSED USE WOULD SIGNIFICANTLY ALTER THE CHARACTER OF THE LODGE AND VILLAGE CENTER PARCELS AND THUS SHOULD BE SUBJECT TO THE PUD AMENDMENT PROCESS**

The Cordillera PUD mandates that any land use changes within the Cordillera PUD that "alter the character or land use of a portion of the project" shall be deemed "major modifications." See Cordillera PUD at § 1.05.1. A major modification requires amendment of the Cordillera PUD. *Id.*

The conversion of the Lodge and Village Center Parcels from a community gathering place to a private compound – accessible only to CCG clients and off-limits to all other Cordillera residents – effectively amputates the Lodge and Village Center Parcels from the Cordillera community. This clearly



represents a significant alteration of the character of those parcels and there is no credible argument to the contrary.

CCG attempts to justify the amputation of the Lodge and Village Center Parcels from the Cordillera community by claiming that the area along Carterville Road now serves as the social gathering place for Cordillera. *See Exhibit 22* at p. 5. However, CCG's own assertions demonstrate that many members of the Cordillera community use (and wish to continue to use) The Lodge as a social gathering place. *Id.* at p. 4-5 and its Exhibit B. CCG does not dispute that it intends to exclude all of the members of the Cordillera community from the Lodge or Village Center Parcels. By definition, such a change will significantly alter the character of the Lodge and Village Center Parcels, and impair the rights of Cordillera landowners who invested in the community with the reasonable expectation that they would have continued access to all of the amenities on those parcels.

The simple fact remains that the Cordillera PUD never intended to permit a single use on the Lodge and Village Center Parcels to the exclusion of all other uses, or to the exclusion of the Cordillera community. To the contrary, the PUD expressly provides that the Lodge and Village Center Parcels are intended to provide the widest mixture of uses, and this broad scope of uses is intended to serve the needs of Cordillera's residents and resort guest alike. *See Cordillera PUD at § 1.05.1.*

To be clear, any proposed use that prohibits the Cordillera community's access to either the Lodge or Village Center Parcel will clearly alter the character of those parcels. For example, while the Cordillera PUD allows "educational facilities" on the Lodge and Village Center Parcels, the conversion of The Lodge to a boarding school that walled off the Cordillera residential community would also represent a major modification requiring amendment of the Cordillera PUD.

Whether or not the Director abused his discretion, such a dramatic alteration to the character of the Lodge and Village Parcels ought not to be permitted based on the Director's cursory administrative interpretation of a provision which the Director himself has suggested is ambiguous. Rather, appropriate land use practice would require a more transparent, public process for effectuating such changes. The PUD already contemplates an amendment process that provides for such a process, and it should be employed with respect to the CCG Proposed Use.

In summary, CCG's proposal to use the Lodge and Village Center Parcels for the exclusive use of its clients and to the exclusion of the Cordillera community represents a significant alteration to the character of the Lodge and Village Center Parcels. This change cannot be authorized based on an administrative interpretation – but rather, the Cordillera PUD mandates that the proper procedure is a PUD amendment process. *See Cordillera PUD at § 1.05.1.*

#### **V. REVERSAL OF THE INTERPRETATION WILL NOT VIOLATE EITHER THE FAIR HOUSING ACT (FHA) OR AMERICANS WITH DISABILITIES ACT (ADA)**

CCG claims that the County Commissioners must uphold the Director's Interpretation "because it is required to do so under the FHA and ADA." *See Exhibit 22* at p. 6. In so claiming, CCG misstates and attempts to hijack these important disability civil rights laws to erect a secured, segregated, inpatient treatment facility that advances none of the purposes of those laws and seeks only to maximize the fees that CCG can charge to the "high net worth individuals" it purports to serve.

The legislative history of the FHA makes clear that it was intended to be "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.Rpt. 100-711, *reprinted at* 1988 U.S.C.C.A.N. 2173, 2179. Two years later, when signing the ADA into law, President George H.W. Bush declared that the ADA would ensure people with disabilities "the opportunity to blend fully and equally into the rich mosaic of the American mainstream."

See Remarks of President George Bush at the Signing of the Americans with Disabilities Act, July 26, 1990. Furthermore, as evidenced by the declaration of Michael Allen, a leading disability rights attorney and partner in the Washington, D.C.-based civil rights law firm, Relman, Dane & Colfax, PLLC, those laws have properly been used for nearly 30 years to secure *precisely the opposite outcome desired by CCG*; that is, opportunities for people with disabilities to be integrated – to the maximum extent possible – with people who do not have disabilities. See Exhibit 29 attached for the Declaration of Michael Allen.

As the Association and District have made clear to the entire Cordillera community and to CCG, they welcome any proposal by CCG to support the housing, recreational and therapeutic needs of its clients in a way that preserves access to the Lodge and Village Center amenities that Cordillera property owners sought when they moved in, and have enjoyed since the community's inception. The Association and District understand how CCG's prospective clients might find Cordillera a therapeutic environment in which to recover from addiction or mental health disorders. They do not understand why such recovery-oriented services must be delivered in a manner that both segregates them from other members of the Cordillera community or why existing Cordillera residents must be excluded from the amenities they have long enjoyed.

The Association and District ask that the Commissioners resist CCG's unfocused, unsupported and misguided attempts to invoke federal disability rights laws to bully the County into approving a Proposed Use so dramatically out of sync with the purposes of those laws and in direct conflict with the language and the purpose of the Cordillera PUD.

**A. Neither the Association, nor the District, nor the County Has Violated the FHA or ADA**

Zoning regulations are a valid exercise of a government's police power. See *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 382, (1926); see also *Messiah Baptist Church v. Cty. of Jefferson, State of Colo.*, 859 F.2d 820, 822 (10th Cir. 1988)(citing *Euclid* and upholding constitutionality of county zoning because it was not clearly arbitrary, unreasonable, and having no substantial relation to the public health, safety, morals, or general welfare). The purpose of zoning is "to bring complementary land uses together, while separating incompatible ones." *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1221 (11<sup>th</sup> Cir. 2008).

Colorado statute expressly recognizes that counties are authorized to zone through the creation of PUDs. See C.R.S. § 24-67-101 *et seq.* A PUD is a "flexible zoning mechanism, not a zoning substitute . . . [allowing] for 'a unified plan of development as an alternative to traditional zoning requirements.'" See *Bd. of Cnty. Commr's of Boulder v. Hygiene Fire Protection Dist.*, 221 P.3d 1063, 1068 (Colo. 2009).

Of course, a zoning regulation or action can be challenged as discriminatory under the FHA and ADA, see e.g. *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10<sup>th</sup> Cir. 2007), but CCG has made no attempt even to frame a *prima facie* case of disparate treatment, and has not even alleged any other theory of disability discrimination by the County or by the Association/District related to the Proposed Use. Rather, in a "notice of claim" to the Association/District on July 5, 2016, CCG alleges, in an entirely unfocused manner, that "recent and continuing actions ... opposing the entry of the Clinic into the PUD constitute actionable violations of certain provisions of [the FHA and ADA]." See Exhibit 21 at p. 1. Three days later, CCG sent a position statement to the Board of Commissioners suggesting that "it is required [to uphold the Director's interpretation] under the FHA and the ADA," but without providing any legal reasoning whatsoever. See Exhibit 22.

If CCG had cognizable claims under the FHA or ADA, one would have expected to see them expressed in correspondence with the Association/District or with the County. Instead, CCG advanced only rudimentary claims, such as that people with addiction or mental health or eating disorders were

protected by the FHA and ADA, or that the residential portions of The Lodge Parcel may constitute “dwelling units” under the FHA. While the Association and District cannot concede either of these points—largely because CCG’s submissions have provided no details about whether its clients might be construed to be “current users” of controlled substances (an appellation applied by some courts to use within the past six months), about whether the average length of stay and domiciliary status of purported CCG clients might render The Lodge transient housing akin to a hotel, or whether other unspecified conditions experienced by purported CCG clients might not rise to the level of a “disability” under the FHA or ADA—they provide no insight whatsoever concerning CCG’s evidence that the Association/District or County have engaged in any disparate treatment sufficient to violate the FHA or ADA. CCG has not engaged in reasoned legal discourse about the inclusion of people with disabilities in the “American mainstream.” Rather, it distorts federal disability rights laws, attempts to bully the County, and seeks to establish a segregated compound, all with the intent of maximizing CCG’s profits.

## **B. No Intentional Discrimination in this Case**

A claim of intentional discrimination requires direct evidence of intentional discrimination. *Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City*, 685 F.3d 917, 920 (10<sup>th</sup> Cir. 2012). Without providing direct evidence of discrimination, the party alleging discrimination must come forward with a *prima facie* case of discrimination, which **must include evidence suggesting that the applicable governmental body denied a specific request because of a party’s disability**. *Id.* To meet this burden, the party alleging discrimination must provide evidence that the governmental body denied to it zoning relief that it granted to similarly situated applicants without disabilities. *Id.*

Here, there is no evidence of discrimination whatsoever.

There was no discriminatory intent in the adoption of the Cordillera PUD or its amendment in 2009. In fact, the 2009 PUD Amendment arose at the request of Behringer Harvard, which is a party that requested the Interpretation in this case. Ironically, the same attorneys who represent CCG today, stated in 2009 on behalf of Behringer Harvard that the purpose for the 2009 PUD Amendment was “to address certain ‘clean-up’ items in the Existing PUD.” See Exhibit 10. Thus, there was simply no discriminatory intent in the adoption of the 2009 PUD Amendment.

Similarly, there can be no discriminatory intent in interpreting the Cordillera PUD. CCG itself initiated the interpretation process regarding a provision of the validly adopted Cordillera PUD. The Director then issued the Interpretation at CCG’s request and, in turn, this appeal followed pursuant to the procedures provided by the Land Use Regulations. State law permits the Association and the District to seek review of the Director’s cursory interpretation, and the good faith pursuit of such review—before the Commissioners or in state or federal court—cannot be construed to be a discriminatory act. In short, there is no discriminatory intent in seeking the proper interpretation of an ambiguous, but clearly non-discriminatory, statute.

## **C. CCG’s Proposed Residential Use is Not Automatically Allowed as a Use-By-Right Pursuant to the FHA as CCG Insinuates**

CCG may or may not be right that the residential component of its Proposed Use constitutes a “dwelling” under the FHA. See Exhibit 22. CCG’s attorney then insinuates that because the residents of the proposed facility will be recovering from addiction and other disorders, the County is therefore bound to treat the Proposed Use as a use-by-right because the Cordillera PUD allows certain specific residential uses on the Lodge and Village Center Parcels. *Id.*

As a threshold issue, CCG did not request the Director determine that the Proposed Use is a residential use-by-right on the Lodge and Village Center Parcels. See Exhibits 18 and 24. Nor did the

Director determine that the residential component of the Proposed Use represents a residential use-by-right on the Lodge and Village Center Parcels. *Id.*

Regardless, examination of the Land Use Regulations and Cordillera PUD demonstrate that the Proposed Use would not represent a residential use-by-right in the Cordillera PUD. The residential component of CCG's Proposed Use represents what is commonly referred to as a "group home." In fact, to the extent the Proposed Use falls within any Eagle County land use regulation, it may most accurately be described as a "Group Home." See Eagle County Land Use Regulation § 2-110, an excerpt of which is attached as Exhibit 30.

While the Cordillera PUD allows for a variety of residential uses, the Cordillera PUD does not list group home or any similar residential rehabilitation facility as a use-by-right on the Lodge and Village Center Parcels. See Cordillera PUD §§ 2.01.1 and 3.01.2. Thus, even if the Proposed Use represents a dwelling as CCG's counsel alleges, it is still not a use-by-right on the Lodge and Village Center Parcels pursuant to the Cordillera PUD. *Id.*

The non-inclusion of group homes or a similar residential rehabilitation facilities on the list of permitted uses on the Lodge and Village Center Parcels did not arise from any discriminatory intent. The purpose for the 2009 PUD Amendment resulting in the uses allowed on the Lodge and Village Center Parcels is set forth above and was not discriminatory. See Argument III above for a discussion of the legislative intent of the 2009 PUD Amendment. In fact, it was CCG's own attorneys (who were representing Behringer Harvard at the time) that proposed each of the residential uses to be allowed on the Lodge and Village Center Parcels. See Exhibit 10. It is therefore impossible for these same attorneys to now claim the absence of a particular residential use is somehow discriminatory when these same attorneys were the ones who prepared the list of permitted residential uses in the first place.

Similarly, the exclusion of the Proposed Use has no discriminatory impact because the operation of any group home that seeks to exclude the Cordillera community from the Lodge or Village Center Parcels would represent a major modification of the Cordillera PUD. See Argument IV above. This is true whether the group home was for the Proposed Use, a boarding school, or even a sorority house that sought to use The Lodge to the exclusion of the remainder of the community. *Corp. of Episcopal Church v. West Valley City*, 119 F. Supp. 2d 1215 (D.Utah 2000) (plaintiffs failed to make an actual showing that they were treated differently because all group homes, including sorority houses, would be excluded from the zone at issue).

In summary, even if CCG's Proposed Use represents a dwelling under the FHA, the FHA does not operate to include the Proposed Use as a use-by-right when the Proposed Use is not allowed by currently existing land use regulations that were adopted without any discriminatory intent and do not discriminate against anyone in their operation.

### **CONCLUSION**

As set forth in this Position Statement, the Director erred in his determination that CCG's Proposed Use represents a use-by-right in the Cordillera PUD. Accordingly, the County Commissioners should properly exercise their jurisdiction and discretion in order to reverse the determination of the Director or, at a minimum, require an amendment of the Cordillera PUD in order to properly consider possible approval of the Permitted Use.

All exhibits referenced in this Position Statement are hereby incorporated by this reference and shall be considered part of the record on appeal, as well as prior correspondence and documentation previously submitted by the Association and District. The Association and the District reserve the right to supplement the record prior to, and at, the hearing for purposes of rebuttal and/or impeachment.

Respectfully submitted on September 12, 2016



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Lew M. Harstead

## **AFFIDAVIT OF RICHARD SMITH**

STATE OF COLORADO                    }  
                                                  }  
COUNTY OF EAGLE                    }       ss.

I, Richard Smith, being of lawful age and being first duly sworn, upon oath, depose and state as follows:

1.       This affidavit is based on my personal knowledge and I am competent to testify as to the matters stated herein.

2.       I have lived in various locations around the world during my working career. Around 1988 or 1989, I attended a corporate event and stayed at the spectacular Lodge and Spa at Cordillera (the "Lodge") and it left a lasting impression. In 2001, while living abroad, my wife and I were considering various locations across the country where to locate upon our return to the United States. Owing in large part to my prior visit to the Lodge, my wife and I decided to purchase our property in Cordillera.

3.       By 2009, I was serving on the Board of Directors of the Cordillera Property Owners Association (the "CPOA").

4.       At that time, the owner of the Lodge, Behringer Harvard (the "Lodge Owner"), proposed amendment of the Cordillera Subdivision Tenth Amended and Restated Planned Unit Development Control Document (the "Prior PUD"). In order to amend the Prior PUD, the Lodge Owner needed to obtain the approval of both the CPOA and Eagle County.

5.       Because the Lodge Owner needed CPOA approval and I was serving as a Director of the CPOA at that time, I have first-hand knowledge regarding the PUD amendment process that resulted in the Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document (the "Current PUD").

6.       Because the Lodge was so vital to the very reason that my family purchased property in Cordillera, I personally was very supportive of doing anything I could in my position with the CPOA to help the Lodge be successful for the good of the Cordillera community.

7.       When the Lodge Owner approached the CPOA requesting approval of the proposed amendment to the PUD, the Lodge Owner made clear that it did not seek to add any new uses to the PUD, but instead sought to clarify uses already authorized on the Lodge and Village Center parcels. Specifically, the Lodge Owner made clear that it sought to amend the Prior PUD so that certain uses that were allowed on the Village Center parcel would also be permitted on the Lodge parcel.

8.       The CPOA was motivated by the desire to help the Lodge remain an integral part of the greater Cordillera community.

9. Accordingly, the CPOA approved the Lodge Owner's proposed PUD amendment in order to provide more amenities and offerings at the Lodge in order to help maintain the Lodge as a vital amenity for the Cordillera community.

10. I am aware that the Prior PUD was amended to specifically recognize that the permitted uses of the Lodge and Village Center parcels would include "Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedure."

11. It was represented to the CPOA that this provision was intended to recognize limited medical procedures that were consistent with the already-existing operation of the spa at the Lodge, including, as stated plastic surgery, cosmetic procedures and other similar procedures. Thus, the purpose of the provision recognizing the use of medical clinic/outpatient facilities was to clarify that limited medical services such as cosmetic treatments, minor cosmetic surgery, botox treatments, colonics and other similar procedures could be offered similar to other 'destination spas' around the world.

12. The Lodge Owner never expressed any intention to operate an inpatient treatment facility, let alone convert the entire Lodge to such a facility to the exclusion of the entire Cordillera community. The type of inpatient treatment facility proposed by the Lodge Owner and/or Concerted Care Group simply does not fit within the type of medical office/facility contemplated and approved during the PUD amendment process.

13. Furthermore, the Lodge Owner never expressed any intention to close the Lodge or Village Center parcels to the Cordillera community. The CPOA would not have approved of any change to the PUD that would result in the Cordillera community being excluded from either the Lodge or Village Center parcels.

14. In summary, the purpose for the amendment of the Prior PUD was to make the Lodge more vibrant for the benefit of the entire Cordillera community. The purpose of the PUD amendment was to make the Lodge more inclusive. The CPOA would never have approved any change which excluded the Cordillera community from using the Lodge and/or segregated the users of the Lodge from the Cordillera community. Such a change would not have fostered the overall goal of ensuring the Lodge would remain the vibrant community-center that drew me to Cordillera in the first place.

15. Finally, the CPOA never intended to discriminate against anyone. In fact, prior to the amendment of the PUD, many of the amenities within Cordillera required a club membership. Without a club membership, individuals only had access to the Lodge. It was the CPOA's belief that access to amenities in Cordillera needed to become less exclusive. Consistent with this belief, the CPOA felt that PUD amendment would make the Lodge more accessible to everyone, thereby benefitting the entire Cordillera community.

Further Affiant sayeth not.



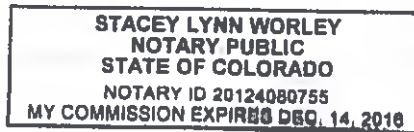
Richard Smith

Subscribed and sworn before me this 29 day of August, 2016 by Richard Smith.

WITNESS my hand and official seal

Stacey L. Worley  
Notary Public

My commission expires: December 14, 2016





**AFFIDAVIT OF ELISE MICATI**

STATE OF COLORADO                     }  
                                                      }  
COUNTY OF EAGLE                    }       ss.

I, Elise Micati, being of lawful age and being first duly sworn, upon oath, depose and state as follows:

1.       This affidavit is based on my personal knowledge and I am competent to testify as to the matters stated herein.

2.       I have resided within the Cordillera resort residential community ("Cordillera") since 1999. I have always understood and believed that the success of Cordillera rests in the health of its 3 components: (1) the residential community; (2) the golf club; and (3) the Lodge & Spa at Cordillera (the "Lodge & Spa"). I have often stated that just like a 3 legged stool cannot stand without 3 strong legs, Cordillera will not succeed if one of these 3 components falters.

3.       In 2009, I was serving on the Board of Directors of the Cordillera Property Owners Association (the "CPOA").

4.       At that time, Behringer Harvard (the "Lodge Owner") owned the Lodge & Spa and sought to amend the then-existing Cordillera PUD.

5.       I have actual knowledge of the 2009 PUD amendment process because I was serving as a Director of the CPOA.

6.       The Lodge Owner approached the CPOA to seek CPOA approval of the Lodge Owner's proposed PUD amendment. There were no formal 'negotiations' because from the CPOA perspective there was nothing to negotiate. We either agreed or disagreed that the proposed changes were in the best interest of the entire Cordillera community, and not just the Lodge Owner. We were under no obligation to alter the PUD just because we were asked to.

7.       The Lodge Owner made certain representations regarding the intended use of its property. I recall the Lodge Owner represented its primary motivation was to allow fractional/timeshare units that were otherwise not permitted.

8.       The Lodge Owner never represented that the proposed amendment would result in the Lodge & Spa being cutoff or closed from the rest of the Cordillera community. To the contrary, the Lodge Owner represented that the proposed amendment would revitalize the Lodge & Spa for the better of the overall Cordillera community.

9.       Since I had always viewed Cordillera as 3 extremely symbiotic components as the residential community, the golf club and the Lodge & Spa were all intertwined in each other's success, I was generally supportive of any amendment that helped strengthen the Lodge & Spa for the benefit of the overall Cordillera community.

10.      I am aware that the PUD was amended to include "Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, without limitation, for outpatient plastic

surgery and other cosmetic procedures" as a permitted use. In fact, I recall discussions regarding this change during the 2009 PUD amendment process.

11. Initially, the Lodge Owner proposed broad language allowing "Medical Offices/Facilities." However, the CPOA was not willing to approve any such amendment because the purpose for the PUD amendment was to allow cosmetic procedures consistent with the operation of the spa at the Lodge & Spa. Specifically, the concept of destination 'medi-spas' was gaining in popularity at that time. The Lodge Owner therefore represented that it sought to clarify in the PUD that the Lodge & Spa could provide certain services such as botox, consistent with the operation of a high class destination medi-spa.

12. Accordingly, the Lodge Owner agreed to include the limiting language set forth in the definition of Medical Facilities/Offices for the very purpose of limiting the types of medical offices/facilities allowed on the Lodge and Village Center parcels. In turn, the CPOA agreed to approve a PUD amendment because such uses were consistent with the existing operation of a destination medi-spa at the Lodge & Spa.

13. I further recall The Lodge Owner represented that the goal of this portion of the PUD amendment was to promote more wide-spread use of the existing spa by both members of the Cordillera community, Lodge guests and those in the greater Eagle County community. As with the addition of the fractional timeshare units, it was believed that a more accessible and successful spa would better support the residential and golf course components for the overall benefit of everyone in the Cordillera community.

14. The Lodge Owner never indicated that the PUD amendment might actually be used as a means to cutoff the Lodge from the rest of the Cordillera community. Such a result would have been contrary to the very purpose of the Lodge and Village Center parcels and the CPOA would never have approved such an amendment. To the contrary, the Lodge Owner at all times represented that the proposed PUD amendment would benefit everyone in the community.


15. The CPOA never approved an inpatient treatment facility that is closed off to the rest of Cordillera community. The CPOA would never have agreed to amputate one of the three legs of our wonderful resort community.

Further Affiant sayeth not.

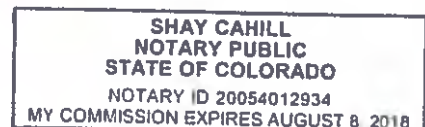
  
Elise Micati

Subscribed and sworn before me this 7 day of September, 2016 by Elise Micati.

WITNESS my hand and official seal.

  
Notary Public

My commission expires: AUGUST 8, 2018



## AFFIDAVIT OF JEFFREY HARTMAN

STATE OF <sup>Texas</sup> ~~COLORADO~~ }  
COUNTY OF Williamson }

I, Jeffrey Hartman, being of lawful age and being first duly sworn, upon oath, depose and state as follows:

1. This affidavit is based on my personal knowledge and I am competent to testify as to the matters stated herein.
2. I worked for the Cordillera Property Owners Association (the "CPOA") for eight years. In 2009, I was the Design Review Coordinator for the CPOA. In that role, I was involved in Behringer Harvard Cordillera LLC's (the "Lodge Owner") amendment of the Cordillera Subdivision Tenth Amended and Restated Planned Unit Development Control Document (the "Prior PUD"). I have actual knowledge of the 2009 PUD amendment process because I was serving as Design Review Coordinator for the CPOA during the amendment process.
3. From approximately July 2009 through October 2009, Lodge Owner and the CPOA began discussions regarding Lodge Owner's request to amend the Prior PUD for the purpose of (i) providing community housing for the employees in the Cordillera development (the CPOA, the Cordillera Metropolitan District, and the Lodge and Spa at Cordillera); and (ii) permitting the transfer of development densities between the Lodge and Village Center Parcels so that Lodge Owner could add timeshare units on the Lodge Parcel.
4. Harry Rosenthal and other representatives of the Lodge Owner attended all the CPOA regular meetings of the CPOA board on behalf of the Lodge Owner from July 2009 through October 2009.
5. The CPOA also had discussions with the Lodge Owner about the uses of the spa located within the Lodge (the "Spa"). Specifically, the CPOA and the Lodge Owner discussed starting to promote additional outpatient type treatments, such as botox, rhinoplasty or other cosmetic, spa-type procedures at the Spa. The goal was to attract more people to the Lodge and Spa from within and outside the community by creating a synergy between the Lodge and the Spa. The idea was that individuals could go to the Spa for cosmetic treatment, and then vacation at the Lodge.
6. The CPOA believed that spa-type cosmetic procedures such as botox and rhinoplasty were consistent with the use of the facility as a spa, and thus, were already implicitly permitted under the Prior PUD.
7. However, to make clear that such cosmetic procedures were allowed, the Lodge Owner proposed amending the Prior PUD to add the term "Medical Offices/Facilities" as a permitted use.
8. The Lodge Owner's broad language did not clearly state that only those uses that were consistent with the operation of the facility as a spa were to be permitted. Thus, at the September 2009 CPOA board meeting, the CPOA requested revising the "Medical Offices/Facilities" use to include the following limiting language: "limited to clinic and outpatient facilities for non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures."

9. The CPOA was the party that added the limiting language and therefore the CPOA understands the meaning of that limiting language. The CPOA added the limiting language to make clear that outpatient cosmetic procedures consistent with the operation of the facility as a spa were permitted. The limiting language was not intended to authorize inpatient treatment facilities.

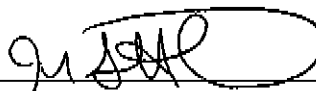
10. Prior to the October 2009 CPOA board meeting, Eagle County inquired whether CPOA's limiting language expanded or clarified the uses allowed prior to the amendment of the PUD. The CPOA felt that cosmetic spa-type procedures could already be performed at the Spa. Moreover, the Lodge Owner had represented that the amendment would not add uses. Thus, the CPOA answered that the language clarified existing uses but did not expand any uses. I wrote a memorandum to the CPOA Board of Directors for their October 2009 board meeting regarding the above, and have attached this memorandum as Exhibit A.

11. In October 2009, Mr. Rosenthal and Jeff Nelson, as representatives of the Lodge Owner, presented the final proposed draft of the amended PUD, which incorporated the limiting language proposed by the CPOA.

12. One of the selling points pitched by the Lodge Owner for amending the Prior PUD was that adding timeshare units would result in additional memberships within Cordillera. Additional memberships meant more people visiting Cordillera which the CPOA believed would ultimately increase sales within the community. Along these same lines, the CPOA felt that promoting additional cosmetic procedures at the Spa would also bring in more people, which might ultimately draw in future residents. In this respect, the CPOA would never have approved an amendment that actually cutoff both the Cordillera community and those from outside the community from using the Lodge and the Spa.

13. Rather, the CPOA approved the amendment because we felt it would inject life into Cordillera by bringing more people into the community and potentially drawing in future residents.

Further Affiant sayeth not.

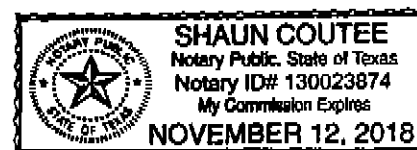
  
\_\_\_\_\_

Subscribed and sworn before me this 9 day of September, 2016 by  
Jeffray Hartman

WITNESS my hand and official seal.

  
\_\_\_\_\_  
Notary Public

My commission expires: November 12, 2018



# OTTENJOHNSON

ROBINSON NEFF + RAGONETTI

November 11, 2009

AMANDA L. SMITH  
303.575.7523  
ASMITH@OTTENJOHNSON.COM

Bob Narracci  
Planning Manager  
Eagle County  
500 Broadway  
Eagle, CO 81631

Re: Cordillera PUD Amendment Application

Dear Bob:

On behalf of our client, Behringer Harvard Cordillera, LLC (the "Applicant"), we are submitting an application (the "Application") to amend the existing Cordillera Subdivision Tenth Amended and Restated Planned Unit Development Control Document, dated as of September 23, 2003 (the "Existing PUD"), as set forth in the proposed Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document (the "Amendment"). As you requested, the Application includes a clean copy of the Amendment, as well as a blacklined copy of the Amendment, marked to show changes against the Existing PUD.

As discussed in connection with the County's preliminary review of the Amendment and the Applicant's pre-application meeting held on November 10, 2009, the Amendment is intended to address certain "clean-up" items in the Existing PUD. The Amendment does not introduce new or additional density or uses to the Existing PUD, or otherwise substantively change the Existing PUD. Rather, the proposed changes include corrections to typographical errors, replacement of inaccurate Guide Maps, updates to reflect the current status of development approvals for the Lodge Parcel and the Village Center Parcel, and clarification of the treatment of the Lodge Parcel and the Village Center Parcel as a single planning parcel.

The Amendment clarifies the concept contained in the Existing PUD that density shifts are permissible among the various planning parcels, so long as the actual maximum densities for the project are not exceeded. More specifically, the Amendment clarifies that density is transferable between the Lodge Parcel and the Village Center Parcel, and that the permitted uses are the same for the Lodge Parcel and Village Center Parcel, effectively treating these adjacent areas as a single planning parcel. This treatment reflects existing development and the contemplated completion of the Lodge at Cordillera.

The Application is in conformance with the sections cited below of Article 5 of the County's Land Use Regulations (the "Code"). The following subsections are numbered as set forth in the Code:

1. Section 5-240.F.3.c. (Standards for a Sketch and Preliminary Plan for PUD):

(1) **Unified ownership or control.** Reviewed and confirmed in connection with approval of the Existing PUD. An updated Title Commitment and a Resolution of Consent of the Cordillera Homeowners' Association are included in the Application package.

(2) **Uses.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(3) **Dimensional Limitations.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(4) **Off-Street Parking and Loading.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(5) **Landscaping.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(6) **Signs.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(7) **Adequate Facilities.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(8) **Improvements.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(9) **Compatibility with Surrounding Land Uses.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(10) **Consistency with Comprehensive Plan.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(11) **Phasing.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(12) **Common Recreation and Open Space.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

(13) **Natural Resource Protection.** Reviewed and confirmed in connection with approval of the Existing PUD; no change in the Amendment.

2. Section 5-240.F.3.m. (Amendment to Preliminary Plan for PUD)

(1) **Modification.** The changes contemplated in the Amendment are consistent with, and will further, the intent of the Existing PUD. By adding clarity to ambiguities in the Existing PUD, summarizing the current status of development approvals and actual improvements, and incorporating updated Exhibits, the Amendment will allow for the development contemplated in the Existing PUD to be executed more efficiently.

(2) **Adjacent Properties.** The Amendment will not have any effect on adjacent properties because it does not change the overall uses or densities currently contemplated in the Existing PUD.

(3) **Benefit.** The Amendment will not confer a special benefit upon any particular person. To the contrary, it will benefit the entire Cordillera PUD and surrounding areas, as it will make the development contemplated by the Existing PUD more efficient.

(4) **Standards.** As indicated above, the standards outlined in Section 5-240.F.3.e. were satisfied in connection with approval of the Existing PUD. The Amendment does not change the Existing PUD in a manner that triggers a new analysis of these standards. The Application includes a blackline of the Amendment, clearly marked to show changes against the Existing PUD.

(5) **Notification.** The Applicant has delivered to the County pre-addressed, stamped envelopes for every property owner in the PUD (including all adjacent property owners). The Application also contains a list of adjacent property owners, based upon the County's most recent records.

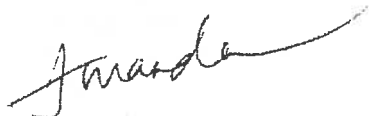
3. Section 5-280.B.3.e. (Standards for a Sketch and Preliminary Plan for Subdivision, if applicable pursuant to Section 5-240.F.1.d.):

N/A. Section 5-240.F.1.d. states that where a PUD also constitutes a subdivision, applicants are required to meet the requirements of Section 5-280 (Subdivision). In this case, because the Amendment does not include or affect a subdivision, the Application does not include a sketch plan or preliminary plan. Therefore, the requirements of Section 5-280.B.3.e. are not applicable to the Application.

As you will see in the Owner Resolution included in the Application package, the Applicant has authorized this firm, together with Harry Rosenthal of the Pharos Group, to act as the Applicant's agent in connection with the Application. We appreciate all of your efforts during the pre-application process and we look forward to working with you to finalize the Amendment. Thank you.

Bob Narracci  
November 11, 2009  
Page 4

Very truly yours,

A handwritten signature in black ink, appearing to read "Amanda", with a long, sweeping horizontal line extending to the right.

Amanda L. Smith  
for the Firm

ALS/cc  
Enclosures

927398 1

cc: Via email w/o encl.:  
Robert Morris, Esq.  
Harry Rosenthal  
J. Todd Reeder  
Tom Ragonetti



# LAND USE APPLICATION FORM

## EAGLE COUNTY LAND USE REGULATIONS

EAGLE COUNTY  
DEPARTMENT OF COMMUNITY DEVELOPMENT  
P.O. BOX 179, EAGLE, CO 81631  
(970) 328-8730 / FAX (970) 328-7185  
[www.eaglecounty.us](http://www.eaglecounty.us)



TYPE OF APPLICATION:	LAND USE REGULATION REFERENCE:	TYPE OF APPLICATION:	LAND USE REGULATION REFERENCE:
<input type="checkbox"/> Sketch Plan Subdivision <input type="checkbox"/> Sketch Plan PUD <input type="checkbox"/> Preliminary Plan Subdivision <input type="checkbox"/> Preliminary Plan PUD <input type="checkbox"/> Final Plat <input type="checkbox"/> Exemption Plat <input type="checkbox"/> Correction Plat <input type="checkbox"/> Location & Extent <input type="checkbox"/> Amended Final Plat <input type="checkbox"/> Minor Type A Subdivision <input type="checkbox"/> Minor Type B Subdivision <input type="checkbox"/> Zone Change <input type="checkbox"/> LUR Text Amendment	Section 5-280, SUBDIVISION Section 5-240, PUD Section 5-280, SUBDIVISION Section 5-240, PUD Section 5-280, SUBDIVISION Section 5-270, SUB. EXEMPTION C.R.S. 30-28-133(a) C.R.S. 30-28-110 Section 5-290, MINOR SUBDIVISION Section 5-290, MINOR SUBDIVISION Section 5-290, MINOR SUBDIVISION Section 5-230, ZONE DISTRICT AMENDMENT	<input type="checkbox"/> Special Use Permit <input type="checkbox"/> Consolidated <input type="checkbox"/> Concept Evaluation <input type="checkbox"/> Final <input checked="" type="checkbox"/> PUD Amendment <input type="checkbox"/> Variance- Zoning/VIS <input type="checkbox"/> 1041 Permit <input type="checkbox"/> Limited Review <input type="checkbox"/> Vacation <input type="checkbox"/> FONSI <input type="checkbox"/> Other _____	Section 5-250, SPECIAL USES  Section 5-240, PUD Section 5-260, VARIANCES Chapter 6, MATTERS OF STATE INTEREST Section 5-2100, CERTIF. OF ZONING Section 5-2200 VACATIONS FINDING OF NO SIGNIFICANT IMPACT

### INVOLVED PARTIES:

#### OWNER/APPLICANT:

Name: See Attachment A  
 Mailing Address: \_\_\_\_\_  
 Town/State/Zip: \_\_\_\_\_  
 Phone #: \_\_\_\_\_ FAX #: \_\_\_\_\_  
 Email Address: \_\_\_\_\_

#### REPRESENTATIVE (Authorization Required):

Name: See Attachment A  
 Mailing Address: \_\_\_\_\_  
 Town /State/Zip: \_\_\_\_\_  
 Phone #: \_\_\_\_\_ FAX #: \_\_\_\_\_  
 Email Address: \_\_\_\_\_

**Note:** All correspondence will be mailed, emailed or faxed to the representative listed above UNLESS otherwise requested.

#### SURVEYOR/ENGINEER:

Name: Chris Williams, Johnson Kunkle & Assoc  
 Mailing Address: PO Box 409, 1286 Chambers Ave #200  
 Town/State/Zip: Eagle, CO 81631  
 Phone #: (970) 904-2420 FAX #: (970) 328-1035  
 Email Address: chrisw@JKandA.com

**NOTE:** Please read the above referenced Section in Chapter II of the Eagle County Land Use Regulations, and the applicable Process Guide. Please submit all necessary application documentation and fees as required.

#### ADJACENT PROPERTY OWNERS:

**For all applications,** please submit a list of all adjacent property owner names and addresses, using the most current Eagle County tax records. These names and addresses must be submitted on adhesive mailing labels or pre-addressed envelopes. Please see corresponding application checklist.

#### DISCLOSURE OF OWNERSHIP:

**For all applications,** please submit the necessary ownership disclosure (dated within two months of the application), pursuant to Section 5-210.D.2.c. Please see corresponding application checklist.

#### SUBSURFACE MINERAL INTERESTS: Pursuant to

**C.R.S. § 24-65.5-103 Notice Requirements, please note:** It is the responsibility of the applicant for any Sketch Plan, Preliminary Plan, Variance, and/or Zone Change application to notify owner(s) and/or lessee(s) of subsurface mineral interests, affected by your proposal.

### PROJECT NAME AND LOCATION:

Assessor's Parcel # See Attachment B  
 Physical/Street Address: \_\_\_\_\_  
 Name of Project: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

#### Legal Description of Project:

Subdivision: Legal Description - See Attachment C  
 Lot \_\_\_\_\_ Block \_\_\_\_\_ Filing \_\_\_\_\_ Tract \_\_\_\_\_  
 Section \_\_\_\_\_ Township \_\_\_\_\_ Range \_\_\_\_\_  
 -- OR --

Attach a Metes and Bounds legal description and survey depicting the property boundary.

**PROJECT DATA (Pursuant to Section 5-210.D.2.e):**

Written Description of Project: This is a clean-up amendment to the existing Cordillera 10th Amended PUD Guide. It treats two parcels, The Lodge and Spa parcel and the Village Center Parcel, as a single planning parcel.

This amendment does not add density or uses; however, uses that were formerly allowed on only one parcel or the other will now be allowed on either parcel. This amendment also incorporates the existing status of both properties with respect to ridgeline protection and affordable housing.

The amendment clarifies that density may be shifted from the Village Center parcel to the Lodge and Spa parcel.

Proposed Land Use Type	# of Lots	# of Units	Acreage	Floor Area Ft <sup>2</sup>
<input type="checkbox"/> Single Family	<u>No Change</u>	<u>See Existing</u>	<u>10th Amended</u>	<u>PUD Guide</u>
<input type="checkbox"/> Duplex	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
<input type="checkbox"/> Multi-Family	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
<input type="checkbox"/> Commercial/Office	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
<input type="checkbox"/> Industrial	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
<input type="checkbox"/> Other: <u>                                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>
Total Project:	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

- |                                                                        |                                                                                                                                                                                                                                                                        |
|------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input checked="" type="checkbox"/> Existing Zoning                    | <u>See existing 10th Amended PUD Guide</u>                                                                                                                                                                                                                             |
| <input checked="" type="checkbox"/> Proposed Zoning                    | <u>No changes in the aggregate to zoning, land use, sources of water, waste disposal, fire protection, or access. In the event that future projects are designed and submitted for approval and final platting, these requirements will be addressed at that time.</u> |
| <input checked="" type="checkbox"/> Existing Land Use(s) (Be Specific) |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Proposed Land Use(s) (Be Specific) |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Existing Source of Water           |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Proposed Source of Water           |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Existing Source of Waste Disposal  |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Proposed Source of Waste Disposal  |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Existing Fire Protection           |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Proposed Fire Protection           |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Existing Access                    |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Proposed Access                    |                                                                                                                                                                                                                                                                        |
| <input checked="" type="checkbox"/> Date of Parcel Creation            |                                                                                                                                                                                                                                                                        |

- ☒ VICINITY MAP ATTACHED (Pursuant to Section 5-210.D.2.d).  
☒ ENVIRONMENTAL IMPACT REPORT ATTACHED, IF REQUIRED (Pursuant to Section 5-210.D.2.f).  
☒ ADDITIONAL REQUIREMENTS ATTACHED, IF REQUIRED (Pursuant to Section 5-210.D.2.g).

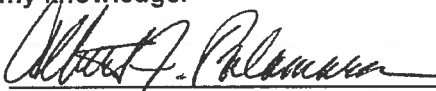
☒ REQUIRED\* PRE-APPLICATION MEETING    ☒ YES    ☐ NO

☒ If YES: Date of meeting: 11/10/09    Planner(s) attended: Bob Narracci

\*See Section 5-210.D

Names

I do hereby certify that the foregoing representations and attachments are true and correct to the best of my knowledge.



Signature of Property Owner or Authorized Representative

11/11/09

Date

**OFFICIAL USE ONLY:**

Received By: \_\_\_\_\_ Date: \_\_\_\_\_  
Amount Received: \$ \_\_\_\_\_ Receipt #: \_\_\_\_\_ Check #: \_\_\_\_\_

## AFFIDAVIT OF RACHEL OYS

STATE OF COLORADO

}

ss.

COUNTY OF EAGLE

}

}

I, Rachel Oys, being of lawful age and being first duly sworn, upon oath, depose and state as follows:

1. This affidavit is based on my personal knowledge and I am competent to testify as to the matters stated herein.

2. I am the General Manager of the Cordillera Property Owners' Association (CPOA) and Cordillera Metropolitan District (CMD). I have served as the General Manager of CPOA and CMD since April 2015.

3. On May 24, 2016, I, in my capacity as General Manager of CPOA and CMD, was invited to meet with Mr. Noah Nordheimer, president and CEO of Concerted Care Group Management (CCG) to learn about the company's pending purchase of the Lodge and Spa at Cordillera. Mr. Nordheimer shared the vision to create a premier wellness facility that would provide mental health, substance abuse, weight management and nutrition, among other potential services. Mr. Nordheimer also referenced that CCG representatives were meeting with the Eagle County Planning Department to gain additional information on permitted land uses.

4. On May 24, 2016, I contacted, in my capacity as General Manager of CPOA and CMD, Mr. Robert Narracci, Managing Director of Community Development for Eagle County to inquire about the meeting Nordheimer referenced above. Mr. Narracci informed me that representatives of CCG had requested, pursuant to the Eagle County Land Use Regulations, that he provide an interpretation regarding the permitted uses on the Lodge and Village Center Parcels pursuant to the Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document (PUD) dated December 21, 2009.

5. Specifically, Mr. Narracci informed me that he was asked to determine if CCG's proposed operation of an inpatient treatment center was a use by right under the following provision in the PUD: "Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures."

6. Mr. Narracci then sent me a copy of his correspondence to CCG's representative, dated June 1, 2016, formally determining that the proposed use is allowed as a use by right pursuant to the PUD (the Interpretation Letter).


7. After reviewing both the PUD and Interpretation Letter, I believed the subject phrase "limited to clinic and outpatient facilities for non-critical care" meant the only allowed medical facilities were those providing both "clinic and outpatient" non-critical care, and that inpatient clinical facilities are not permitted by the PUD.

8. On June 2, 2016, I engaged in a call with Mr. Narracci and Alan Pogue, the CPOA and CMD's attorney. During that call, I asked Mr. Narracci to clarify and expand upon the conclusions reached in the Interpretation Letter. I suggested that the phrase "clinic and outpatient facilities for non-critical care," should be interpreted to mean that only a clinic providing outpatient services for non-critical care is permitted, and that inpatient clinical facilities are not permitted by the PUD.

9. Mr. Narracci indicated that my suggestion was one of two possible readings of the language. Mr. Narracci stated he could read the subject PUD provision to mean either: that a permitted medical facility must provide 'clinic and outpatient' non-critical care; OR that a permitted medical facility may be either a 'clinic' providing non-critical care or an 'out-patient facility' providing non-critical care. Mr. Narracci informed me that he chose to use the latter interpretation – that a permitted medical facility may either be a 'clinic' or an 'outpatient facility' – so he concluded that the "clinic" also allowed for inpatient clinical facilities.

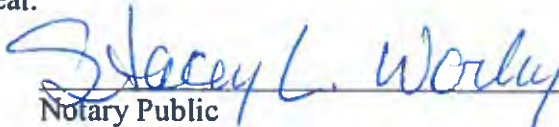
10. I indicated to Mr. Narracci that I did not believe the proposed use was consistent with the legislative intent of the PUD, and specifically the amendment to the PUD that added the provision at issue. I stated that the amendment to the PUD in 2009 was intended to allow for cosmetic procedures as an ancillary service to be provided at the Lodge and Spa at Cordillera.

Further Affiant sayeth not.

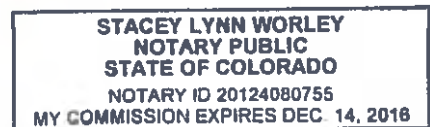
  
Rachel Oys

Subscribed and sworn before me on September 9, 2016 by Rachel Oys.

WITNESS my hand and official seal.

  
Notary Public

My commission expires: December 14, 2016



**AFFIDAVIT OF LAURENCE W. BROOKS, M.D.**

STATE OF COLORADO                    }  
                                                  }  
COUNTY OF EAGLE                    }           ss.

**LAURENCE W. BROOKS, M.D.**, being duly sworn under oath, states as follows:

1. My name is Laurence W. Brooks. I am a medical doctor licensed to practice in the State of Colorado. A copy of my Curriculum Vitae is attached as Exhibit A.
2. During the history of my medical practice, I helped establish and operate the following medical clinics in Eagle County: (i) Vail Urgent Care; (ii) Edwards Urgent Care; and (iii) Gypsum Urgent Care. In addition, I also helped establish and operate the Breckenridge Medical Clinic in Summit County.
3. I therefore have first-hand experience operating medical clinics in Eagle County.
4. I am aware that Concerted Care Group Management (“CCGM”) has proposed the operation of an inpatient treatment center on the Lodge and Village Center parcels at Cordillera. I understand from the letter of Robert Naracci, AICP, Managing Director of Community Development (the “Director”) that CCGM’s proposed inpatient treatment center will be for the “treatment of a variety of conditions, including, but not limited to, eating disorders, alcoholism, chemical dependency and behavioral health conditions.”
5. I am also aware that the Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document (the “PUD Guide”) permits the following uses on the Lodge and Village Center parcels:

*Medical Offices/Facilities, limited to clinic and outpatient facilities for non-critical care, including, without limitation, for outpatient plastic surgery and other cosmetic procedures.*

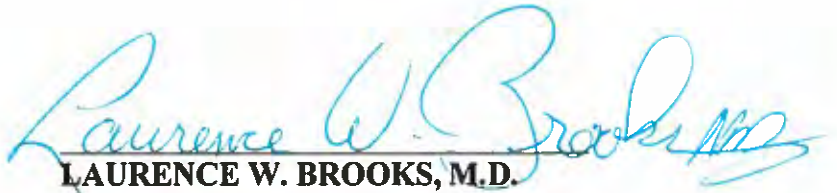
(Emphasis added.)
6. I am further aware that the Director determined that CCGM’s proposed inpatient treatment center represents a “clinic” permitted pursuant to the provision of the PUD Guide set forth above.
7. The Director erred in reaching this conclusion. CCGM’s proposed inpatient treatment center is not a medical “clinic.”
8. Medical clinics, at their core, focus on the treatment of non-resident patients. In this case, CCGM’s public statements have indicated that CCGM intends provide ongoing, continuous and uninterrupted treatment in an environment featuring patient stays of a month (or perhaps longer). An inpatient treatment center where patients receive care for lengthy stays simply does not meet the definition of a clinic. A treatment center is just that, a treatment center – and not a clinic. Furthermore, to the extent that CCGM seeks to provide medical treatment to

patients in a residential setting, then it would reasonably be expected that the proposed inpatient treatment center would feature services such as nursing, dining, security and other similar functions that are inconsistent with the operation of a clinic.

9. Furthermore, as a licensed physician who practiced at, established and operated various medical facilities in Eagle County, I believe that the CCGM's proposed use would fall within the definition of a "Hospital" under the Eagle County Land Use Regulations.

10. In conclusion, it is my professional opinion, as a licensed physician who established and operated numerous medical clinics in Eagle County, that the inpatient treatment center proposed by CCGM in Cordillera fails to meet the definition of a "clinic."

Further Affiant sayeth not.

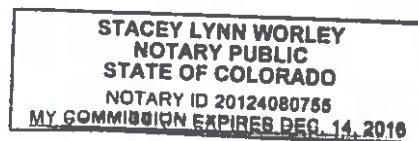
  
LAURENCE W. BROOKS, M.D.

Subscribed and sworn before me on September 2, 2016 by Laurence W. Brooks, M.D.

WITNESS my hand and official seal.

  
Notary Public

My commission expires: December 14, 2016



**Expert Witness Report**  
**of**  
**Ellen E. Stewart, MSHA, JD, FHFMA**

**Shareholder**  
**Berenbaum Weinshienk PC**  
**370 17<sup>th</sup> Street, Suite 4800**  
**Denver, Colorado 80202**

**September 6, 2016**

I have been retained by the Cordillera Metropolitan District (the “District”) and the Cordillera Property Owners Association (the “Association”) to prepare this report and provide my opinion in the appeal of the Eagle County Planning Director’s Interpretation Letter to the Board of County Commissioners of Eagle County.

In connection with my opinion, I was asked to review certain documents provided by the District and the Association. The documents reviewed in preparation of this opinion are set forth on Exhibit A.

I have been practicing health care law in Colorado since 1984. In addition to a law degree, I also have a Master of Science in Health Administration from the University of Colorado Medical Center (now the University of Colorado Denver) which I received in 1979. After receiving my Masters degree I worked in the Finance Department of Presbyterian/ St. Luke’s Medical Center (now part of HealthOne). Upon receiving my law degree I held the position of Associate General Counsel for Presbyterian/St. Luke’s until the sale of this nonprofit. I entered private practice in 1986 at the law firm of Gorsuch Kirgis, LLP where my practice focused on the representation of health care clients. Over the last 30 years in private practice I have represented numerous health care providers in regulatory matters including licensure issues with the Colorado Department of Public Health and Environment and compliance with regulations of the United States Department of Health and Human Services, Center for Medicare and Medicaid Services. I have represented clients such as hospitals, physicians and clinics in licensing preparation and related issues, as well as other compliance matters relating to federal and state law affecting health care providers. A copy of my current curriculum vitae, which includes a list of the publications I have authored over the last ten years, is attached as Exhibit B.

The opinions set forth herein are my opinions and I hold them to a reasonable degree of probability given the facts and circumstances set forth herein.

## **DEFINITIONS OF “CLINIC” AND “PSYCHIATRIC HOSPITAL” UNDER COLORADO LAW**

### **Definition of “Clinic” Under Colorado Law:**

The Colorado Department of Public Health and Environment licenses (“CDPHE”) healthcare facilities in the state of Colorado pursuant to CRS §25-1.5-103. CDPHE has regulatory authority over numerous, but not all, health care facilities in Colorado. CDPHE regulates inpatient facilities such as hospitals and psychiatric hospitals. It also regulates community clinics and community clinics with emergency rooms, among many other types of providers.

The CDPHE regulations defining a community clinic are found at 6 CCR 1011-1 Chapter 9 in the Colorado Code of Regulations. The regulations define a community clinic as:

- (a) a health care facility that provides health care services on an ambulatory basis, is neither licensed as an on-campus department or service of a hospital nor listed as an off-campus location under a hospital’s license, and meets at least one of the following criteria:



- (i) operates inpatient beds at the facility for the provision of extended observation and other related services for not more than seventy-two hours.
- (ii) provides emergency services at the facility.
- (iii) is operated or contracted by the Department of Corrections.
- (iv) provides primary care services, is not otherwise subject to health facility licensure under Section 25-3-101, C.R.S. or Section 2-1.5-103, C.R.S., but opts to obtain licensure in order to receive private donations, grants, government funds, or other public or private reimbursement for services rendered.

### **Definition of “Psychiatric Hospital” Under Colorado Law:**

The CDPHE defines a psychiatric hospital as:

"Psychiatric hospital" means a health facility planned, organized, operated, and maintained to provide facilities, beds, and services over a continuous period exceeding twenty-four (24) hours to individuals requiring early diagnosis and intensive and continued clinical therapy for mental illness. Services, including but not limited to, inpatient services, continuous nursing services, and necessary ancillary services, shall be provided twenty-four hours per day, seven days per week. (6 CCR 1011-1, Chapter 18).

### **APPLICATION OF DEFINITIONS TO THE PROPOSED FACILITY**

The Cordillera PUD, as amended, recognizes certain Medical Offices/Facilities as permitted uses. Specifically the definition of permitted medical facilities is:

Medical Offices/Facilities – limited to clinic and outpatient facilities for non-critical care, including without limitation, for outpatient plastic surgery and other cosmetic procedures.

Concerted Care Group Management (“Concerted”) is proposing an inpatient clinic for treating conditions such as eating disorders, alcoholism, chemical dependency and various behavioral health conditions. (See Otten Johnson letter July 5, 2016). The proposed facility has also been described as a residential treatment facility for the care and treatment of persons with drug and alcohol abuse as well as co-morbid mental illness, such as eating disorders and various behavioral health conditions. (See Otten Johnson Memorandum of July 8, 2016). Concerted is proposing an average monthly cost for a patient stay of \$60,000 and they propose there will be 24 hour supervision and support for the patients at the facility.

In my opinion, the Concerted project is not for the development of a clinic under Colorado law. Specifically under the CDPHE definition, a clinic can have a length of stay that is no greater than 72 hours. The proposed facility has a length of stay well in excess of the requirement to be considered a clinic in Colorado.

Furthermore, the scope of services at the proposed Concerted facility includes certain services which meet the definition of a psychiatric hospital under Colorado law. Eating disorders (such as anorexia nervosa and bulimia) are mental illnesses as defined by the Diagnostic and Statistic Manual of Mental Disorders, Fifth Edition (DSM-V). In Colorado, the treatment of mental illness such as proposed by Concerted is properly conducted in a psychiatric hospital facility, and the services to be provided come within the CDPHE definition of a psychiatric hospital.

## **CONCLUSION**

Concerted's proposed facility fails to meet the definition of a "clinic" under Colorado law. Furthermore, certain proposed patients to be treated by Concerted are the types of patients treated in an inpatient psychiatric hospital under Colorado law. Concerted's proposed facility therefore fails to meet the definition of a medical office/facility limited to clinic and outpatient facilities for non-critical care.

## **Certification**

I certify, under penalty of perjury that I have prepared and signed this report.

  
\_\_\_\_\_  
Ellen E. Stewart

Date: Sept 9, 2016

**INDEX OF DOCUMENTS RECEIVED FROM CLIENT**

	<b>Date</b>	<b>Document</b>
1.	June 1, 2016	Letter from the Eagle County Director of Community Development's Zoning Interpretation of the PUD
2.	June 29, 2016	Cordillera Metropolitan District (District) and the Association's appeal of the Director's PUD Interpretation, dated
3.	July 5, 2016	Ragonetti (Attorney for Concerted Care Group) Letter to Lew Harstead regarding ADA/FHA claims, dated
4.	July 7, 2016	Behringer Harvard Cordillera's (current owner of the property) letter to Eagle County Director regarding Concerted Care Group acting at BHC's direction
5.	July 8, 2016	Concerted Care Group's response to the District's and Association's Appeal of the Director's interpretation
6.	July 11, 2016	Letter from the Eagle County Director of Community Development's Zoning Interpretation of the PUD rescinding his June 1 <sup>st</sup> interpretation
7.	n/a	Definition Analysis - Eagle County Land Use Regulations
8.	n/a	Appeal additional info (list of names, research, web addresses)
9.	June 13, 2016	Vail Daily News article
10.	August 2, 2016	CDPHE licensing contact
11.	August 2, 2016	Patrick K. Fox (Chief Medical Officer, Deputy Director of Clinical Services, Office of Behavioral Health) email
12.	August 2, 2016	Office Behavioral Health Regulations
13.	n/a	Robert Narracci, Eagle County Community Development letter to attorneys
14.	January 11, 2010	Resolution approving the Cordillera Subdivision Eleventh Amended and Restated Planned Unit Development Control Document
15.	n/a	Regulations of the Colorado Department of Public Health and Environment

**ELLEN E. STEWART, M.S.H.A., J.D., FHFMA  
PARTNER**

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**CURRICULUM VITAE**

**EXPERIENCE**

- 2005-present • Berenbaum Weinshienk PC
  - Represents hospitals, long-term care facilities, physicians, preferred provider organizations, PHO's, MSO's and other forms of alternative delivery systems and health-related entities in transactional and litigation matters (including PRRB and State Medicaid).
- 1986-2005 • Gorsuch Kirgis LLP, Denver, Colorado (Partner 1990 to 2005)
- 1979-1985 • P/SL Healthcare Corporation, Denver, Colorado
  - Began as Corporate Projects Analyst and promoted to Associate General Counsel.
  - As Associate General Counsel, represented the parent and its subsidiaries on health care issues with emphasis on medical staff relationships, corporate structure, litigation coordination, corporate alternative business lines acquisition and alternative delivery systems, partnerships, financial support and loan programs, securities documents and management of corporate contracts and insurance program.
- 1978 • St. Luke's Hospital, Denver, Colorado  
Administrative Resident

**EDUCATION**

- B.A., University of Colorado (1977)
- M.S., Health Administration, University of Colorado Medical Center (1979)
- J.D., University of Denver College of Law (1984)

## **PROFESSIONAL ORGANIZATIONS**

- Colorado Bar Association, Health Law Section (Council Member 1991 to 1998; Chair of Section 1996-1997)
- Denver Bar Association
- Healthcare Financial Management Association, Colorado Chapter, (Board of Directors, 1987 to present; Treasurer, 1988-1989; Secretary 1989-1990; Vice President 1990-1991; President Elect 1991-1992; President 1992-1993; Secretary 2001-2005); National Matrix 1993-1994; Chapter Liaison Representative 1996-1997; National Nominating Committee 1997-1998; Numerous Chapter Committees.
- American Health Lawyers Association
- American Bar Association
- Colorado Women's Forum in Health Administration (Vice President 1988-89; President 1989-90; Board of Directors 1987 to present)
- American College of Health Care Executives

## **CIVIC ORGANIZATIONS**

- Medical Care and Research Foundation, Board of Directors (1994 to 2005)
- Francis Heights/Clare Gardens; Board of Directors and Vice Chairman (1987-1991) (HUD subsidized elderly housing project)
- Montview Manor; Board of Directors (1985-1988) (HUD financed elderly housing project)
- Atlantis Condominium Association; Board of Directors and President (1979 to present)
- Linkages for Older Adults; Board of Directors (1989-1991) (Community Outreach program for senior citizens of Park Hill)
- Presbyterian/St. Luke's School of Nursing Alumni Association (1987 to present) Honorary Member
- University of Denver, Alumni Admissions Council (1985 to present)
- University of Colorado, Boulder, Career Counseling Panels (1989, 1990, 1991, 1992)
- Opera Colorado Guild Member (1990 to present)

Bravo Ball Co-Chairman (1991)  
Grand Ball at 9 and Meistersinger Committees (1992)  
Special Events Committee (1993-1996)

- Colorado Cancer League, Corporate Board of Directors (1992 to present)
- Children's Hospital Gala, Corporate Committee (1992 to present)
- Central City Opera Guild, Espirit de Noël, Volunteer
- University of Colorado Foundation, Wines for Life Volunteer
- Friends of Nursing, Member and Volunteer
- Leadership Denver, Class of 1994, Health Care Day Coordinator (1997, 1998, 1999)
- Town Hall Arts Center, Board of Directors (2007 to 2015)
- Parkinson's Association of the Rockies (pro bono legal counsel)
- A.J. Kauvar Foundation, Board of Directors (2009 to present)

### **TEACHING**

- Honorarium Faculty, University of Colorado at Denver, Graduate School of Business, Program in Health Administration (Ethical Decision Making in Health Care)
- Honorarium Faculty, University of Denver, University College, Graduate Program in Health Administration (Health Law)
- Honorarium Faculty, College of St. Francis, Graduate Program in Health Administration (Health Law)

### **EDITORIAL BOARDS**

- Healthcare Financial Management Association, Healthcare Financial Management.

### **AWARDS**

- Healthcare Financial Management Association: Folmer Bronze Award, Reeves Silver Award, Muncie Gold Award and Medal of Honor
  - Colorado Super Lawyer, 2006 -2016
  - Best Lawyers in America 2010- 2016
- 5280 Top Attorneys 2016

**AFFIDAVIT OF DAVID H. GOLDSTEIN, M.D.**

STATE OF FLORIDA                    }  
                                              }  
COUNTY OF SARASOTA               }

ss.

**DAVID H. GOLDSTEIN, M.D.**, being duly sworn under oath, states as follows:

1. My name is David Goldstein. I am a medical doctor licensed to practice in the State of Florida. A copy of my Curriculum Vitae is attached as Exhibit A.

2. In my current medical practice, I treat patients who are dealing with withdrawal symptoms arising from addictions to alcohol, cocaine, benzodiazepines, heroine, painkillers and other substances. I therefore understand the nature of care needed to serve patients in inpatient treatment facilities that treat substance addiction.

3. Patients may enter an inpatient treatment facility in a non-critical condition. However, because the patient is dependent on a substance, they will experience withdrawal symptoms when the substance is then removed at the treatment facility. Different substances will cause different withdrawal symptoms in different individuals. Individuals experiencing severe withdrawal may suffer life-threatening symptoms such as seizures, irregular heartbeats, cardiac arrest, low body temperature, hallucinations, suicidal thoughts and/or suicidal depression. Upon the occurrence of these symptoms, the patient's care then becomes critical.

4. Sometimes a clinic may state that it will admit ONLY patients who have already undergone DETOX and therefore may be seen as a "non-critical" care clinic. The problem, however, is that in many occasions the DETOX is incomplete or unsatisfactory upon admission to these facilities and there remains the risk of withdrawal and its associated morbidities and mortality. Such clinics must have access to immediate emergency care if not incorporated in their structures. They must be within minutes of ambulance and emergency hospitalization.

5. In other words, a "non-critical" facility must have immediate access to a critical one or have the ability to offer critical care itself. The nearest hospital to Cordillera is the Vail Valley Hospital and is over 16 miles away. In winter driving the time to reach that facility could be over an hour and if roads are closed to due weather the time may be indefinite.

6. How could a "non-critical" facility handle patients with a propensity to become "critical", in this instance? Only by offering the availability to provide such "critical" care when required.

7. Furthermore, the group of patients suffering from addiction issues commonly have significant medical problems even after DETOX. For example, alcoholics often go into liver failure, become comatose, have sudden gastric life threatening bleeding. Cocaine and heroin users often have cardiac issues, heart valve infections. In short, the population admitted

the center has many life threatening health issues that can manifest suddenly and without warning. How will the clinic handle these issues during a snow storm or its aftermath? Of course they will equip themselves with the ability to provide interim critical care!

8. In addition, patients at treatment facilities often seek substances during the course of their treatment and it is common for substances to be 'smuggled' into treatment facilities. This is a common problem. Accordingly, individuals in treatment facilities who may use substances during the detoxification process are at risk of additional symptoms, including some possibly life threatening symptoms (including seizures, irregular heartbeats and/or cardiac arrest). Upon occurrence of these symptoms, the patient's care then becomes critical.

9. Patients who have been away from drugs and suddenly use "smuggled drugs" tend to use the amount they were used to previously. In their "detoxed state", however, their bodies are not used to such a high dose (in other words their tolerance has diminished). This frequently leads to severe respiratory depression or arrest. The treatment for this requires emergent respiratory support to be provided within SHORT MINUTES until help arrives. How can this be provided when EMS may not be able to arrive timely? The facility, of course, will provide that "critical care".

10. **Therefore, the operation of this proposed inpatient treatment facility for alcohol or substance addiction must necessarily have a critical care component because a certain number of patients in these facilities will require critical care that cannot be consistently and timely available.**

11. I am aware that Concerted Care Group Management has proposed the operation of an inpatient addiction treatment facility at The Lodge & Spa at Cordillera. In a letter dated July 1, 2016, the Eagle County Managing Director of Community Development stated that Concerted Care Group Management's proposed inpatient facility will provide "treatment for a variety of conditions including, but not limited to, eating disorders, alcoholism, chemical dependency, and behavioral health conditions."

12. The Eagle County Managing Director of Community Development concluded that this proposed use, which includes treatment for alcohol and chemical dependency, somehow meets the definition of a medical facility providing "non-critical care."

13. The Eagle County Managing Director's determination in this regard is simply wrong. As set forth above, any inpatient treatment facility treating alcohol or substance addiction must have a critical care component as a necessary and important component of its operation.

14. This is particularly true for any inpatient treatment facility which might operate at The Lodge & Spa at Cordillera. I am familiar with the location of The Lodge & Spa at Cordillera and its limited access to roadways and other medical facilities in Eagle County. Due to its remote and isolated location, any inpatient addiction treatment facility located at The Lodge & Spa at Cordillera must necessarily include a critical care component to provide for the certain occurrence of a patient emergency due to withdrawal from substance addiction.



15. In summary, it is my professional and medical opinion that an inpatient facility treating alcohol or substance addiction, which facility is located at The Lodge & Spa at Cordillera, must provide a certain level of critical care. **Accordingly, the inpatient treatment facility proposed by Concerted Care Group Management cannot meet the definition of a medical facility providing "non-critical" care.**

Further Affiant sayeth not.

  
\_\_\_\_\_  
DAVID H. GOLDSTEIN, M.D.

Subscribed and sworn before me on September 1<sup>st</sup>, 2016 by David H. Goldstein, M.D..

WITNESS my hand and official seal.

  
\_\_\_\_\_  
Notary Public

My commission expires: 12/18/2017



Devin Miller  
State of Florida  
MY COMMISSION # FF 77759  
Expires: December 18, 2017

## **Declaration of Michael Allen**

I, Michael Allen, declare as follows:

1. I make this declaration of my own personal knowledge of the facts stated herein. If called as a witness in this proceeding, I could and would competently testify thereto.

2. I am a partner in the civil rights firm of Relman, Dane & Colfax, PLLC. At present, and during the ten years I have been at the firm, my docket has focused on disability rights matters under the Fair Housing Act (FHA) and Americans with Disabilities Act (ADA).

3. A copy of my *curriculum vitae* accompanies this declaration as Exhibit 1, and includes my selected publications and the significant reported cases I have litigated.

4. From 1995 to 2006, I was a senior staff attorney at the Bazelon Center for Mental Health Law, where my work consisted of policy advocacy, litigation, training and writing involving community integration of people with disabilities.

5. From 2004 to the present, I have also been board chair of Pathways to Housing DC, a nonprofit group focused on ending homelessness for people with mental illnesses and/or substance abuse disorders. Pathways has been successful in moving more than 600 street-dwelling, chronically homeless men and women in the District of Columbia into their own apartments with voluntary, wrap-around services in a manner that helps the District fulfill its obligations under the ADA and FHA to provide housing and services in a manner that integrates people with disabilities into the community, rather than serving them in segregated settings.

6. I received a J.D. from the University of Virginia School of Law in 1985, and have focused my law practice on poverty, disability and civil rights legal advocacy continuously since that time. In addition to litigation and public policy advocacy, I have published a number of articles concerning civil rights-compliant approaches to supporting people with mental health and addiction disorders. These are listed in my *curriculum vitae*.

7. As an adjunct professor at University of Virginia School of Law, Washington College of Law at American University, and Howard University School of Law, I taught courses on housing discrimination and related topics from 1999 to 2006.

8. In preparing this declaration I reviewed the following documents:

- a. Cordillera Subdivision Tenth Amended and Restated Planned Unit Development (PUD)(approved by Eagle County Commissioners, October 14, 2003)
- b. Cordillera Subdivision Eleventh Amended and Restated PUD (approved by Eagle County Commissioners, January 5, 2010).

- c. Letter of Robert Narracci, AICP, Managing Director of Community Development, Eagle County, to Dominic Mauriello, as the same was renewed effective June 11, 2016 (Director's Interpretation).
- d. Letter of Noah Nordheimer, Concerted Care Management Group, to CPOA Board Members, May 31, 2016.
- e. *Vail Daily News Article*, available at <http://www.vaildaily.com/news/22397078-113/more-changes-possible-at-cordillera>
- f. Letter of Lew M. Harstead to Eagle County Administrator, re: Appeal of Director's Determination, June 29, 2016.
- g. Letter from Tom Ragonetti to Lew M. Harstead, July 5, 2016.
- h. Memorandum from Tom Ragonetti to Eagle County Board of County Commissioners, July 8, 2016.

9. I was asked by the Cordillera Property Owners Association (CPOA) and the Cordillera Municipal District (CMD) to opine on the assertions in Mr. Ragonetti's letter of July 5, 2016 (Letter) and his Memorandum of July 8, 2016 (Memorandum) with respect to the FHA and ADA.

10. While Concerted Care Group (CCG) has not provided any detailed description of its plans for use of The Lodge and Village Parcels at Cordillera to the CPOA, the CMD or to Eagle County, I understand from my review of the documents listed in ¶8, above, that the Proposed Use has been described as "a clinic including inpatient, non-critical care, for treatment of a variety of conditions including, but not limited to, eating disorders, alcoholism, chemical dependency, and behavioral health conditions." (Letter of Robert Narracci).

11. The Proposed Use is further described as "a health and wellness facility that is unparalleled in clinical results while providing the type of luxury environment considered standard by our clientele, many of whom are business leaders, professional athletes and high profile, high net worth individuals. We expect to provide services in the areas of mental health, substance abuse, weight management and nutrition, among other potential service lines." (Letter of Noah Nordheimer).

12. I am informed that CCG's clients will pay \$60,000 per month, in large part for "anonymity." (Vail Daily News).

13. In reviewing the Letter and the Memorandum, in conjunction with the other documents listed in ¶8, above, it became apparent to me that it would be necessary to consider and answer four questions:

- a. To the extent it is defined in the materials listed in Section III, above, is the

Proposed Use consistent with the legislative objectives of the Fair Housing Act (FHA) and the Americans with Disabilities Act (ADA)?

- b. Does the Proposed Use qualify for coverage under the FHA and ADA?
- c. Does the decision by CPOA and CMD to appeal the Director's Interpretation constitute a violation of the FHA or ADA?
- d. Would a decision by the Eagle County Board of County Commissioners (Commissioners) to reverse the Director's Interpretation constitute a violation of the FHA or ADA?

14. Based upon a reasonable degree of professional knowledge concerning the language, legislative history, administrative and judicial enforcement of the FHA and ADA, my opinion is that the questions posed in ¶¶12.a., 12.c. and 12.d., above, must be answered in the negative. I conclude that there is simply not enough information to answer the question posed in ¶12.b., and therefore it cannot be said with any certainty whether the FHA and ADA even apply to the Proposed Use. The reasoning and analysis supporting each of these opinions is set out below.

15. Is the Proposed Use Consistent with the Purposes of the FHA and ADA?

Answer: No.

- a. As a threshold matter, I assessed whether CCG's Proposed Use is consistent with the legislative purposes of the FHA and ADA. For the reasons outlined below, I have concluded that—whether or not CCG can establish that: (1) CCG's prospective clients all meet the definitional threshold of "disability"<sup>1</sup> under the FHA and ADA; (2) CPOA or CMD are subject to the ADA; or (3) any part of its program constitutes a "dwelling" for purposes of the FHA—CCG's Proposed Use appears to be antithetical to the purposes of the FHA and ADA, in that it purports to be a segregated, inpatient treatment facility, with security guards, intended to separate people with disabilities from other members of the Cordillera community rather than integrate them, as envisioned by the FHA and ADA. Furthermore, CCG appears to justify this segregationist approach not on therapeutic grounds, but in pursuit of high monthly fees attributable to "anonymity." In other words, the Proposed Use is inconsistent with the stated purposes of the FHA and ADA.
- b. The legislative history of the FHA makes clear that it was intended to be "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.Rpt. 100-711, reprinted at 1988 U.S.C.C.A.N. 2173, 2179. Two years later, when signing the

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<sup>1</sup> The FHA uses the term "handicap" instead of the term "disability." Both terms have the same legal meaning. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This Declaration uses the term "disability," which is more generally accepted.

ADA into law, President George H.W. Bush declared that the ADA “signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life,”<sup>2</sup> and guarantee “the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”<sup>3</sup>

- c. During my tenure at the Bazelon Center for Mental Health Law (1995-2006), I was principal author of a number of publications, including the *Digest of Fair Housing Cases and Other Resources on Fair Housing for People with Disabilities*. I was charged with reviewing significant federal and state court litigation involving the FHA’s disability provisions and reporting on their significance to disability advocates around the country. Through regular updating of the *Digest* and the publication of other articles, I became familiar with every reported decision under the FHA involving housing and services for people with mental health and addiction disorders, and many ADA cases involving the same issues. Over hundreds of such decisions, a unifying principle behind successful FHA or ADA litigation was that individual plaintiffs with disabilities or housing and services providers sought to eliminate barriers to participation by, and inclusion of, people with disabilities, in settings that *increased* their exposure to and interaction with people who did not have disabilities.
- d. In other words, all of the FHA and ADA cases with which I am familiar have sought precisely the opposite of what CCG seeks to achieve with the Proposed Use. Rather than maximize the interaction its clients will have with members of the Cordillera community who do not have disabilities—consistent with best therapeutic practice applicable to mental health and addiction disorders—CCG seeks to wall off its clients and *prevent* their integration into the broader Cordillera community.

16. Does the Proposed Use Qualify for Coverage Under the FHA and ADA?

Answer: CCG has not provided sufficient information to answer this question, and therefore it cannot be said with any certainty whether the FHA and ADA even apply to the Proposed Use.

- a. Certainly, as applied to specific facts of specific cases, federal courts have held that people with addiction or mental health disorders may have a disability under the FHA or ADA. But one cannot say with certainty that the FHA and ADA even apply to CCG’s prospective clients because CCG has provided so little detail about those clients and its purported therapeutic services. For instance, individuals who are currently using controlled substances are not covered by the FHA or ADA at all. *See Mauerhan v. Wagner Corporation*, 649 F.3d 1180, 1187 (10<sup>th</sup> Cir. 2011)(quoting from the legislative history, which provides that the ADA “does not permit persons to invoke the Act’s protection simply by showing that they are participating in a drug treatment program. Rather, refraining from illegal

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<sup>2</sup> Statement on Signing the Americans with Disabilities Act of 1990, July 26, 1990, available at <http://www.presidency.ucsb.edu/ws/?pid=18712>

<sup>3</sup> Remarks of President George Bush at the Signing of the Americans with Disabilities Act, July 26, 1990, available at [https://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html)

use of drugs is also essential. Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem.”) In citing to the Second Circuit’s *Innovative Health Systems* decision, the CCG Memorandum leaves open the door to the conclusion that CCG’s Proposed Use may actually include some current users of controlled substances. While CCG is certainly within its rights to offer services to such clients, doing so may remove FHA and ADA protection altogether from the Proposed Use.

- b. Furthermore, because of the vagueness of its description of services to be offered—such as “weight management and nutrition and other potential service lines”—it is impossible to assess which of CCG’s clients even meet the definitional threshold for coverage, which requires a mental or physical impairment that substantially limits a major life activity, a history of such an impairment, or being regarded as having such an impairment.<sup>4</sup> In other words, it is impossible to know whether the Proposed Use is principally for the benefit of people with disabilities, or for people without disabilities. Without that information, CCG may not be able to establish that the FHA and ADA even apply to the Proposed Use, let alone that those laws would compel the Board of Commissioners to uphold the Director’s Interpretation.<sup>5</sup>
- c. Were CCG to demonstrate that it was actually associated with people with disabilities, it could not secure coverage under the FHA unless the Proposed Use met the minimum definition of “dwelling” under the FHA.<sup>6</sup> Because CCG has not provided a prospectus or business plan—and apparently has not previous experience with any residential or “inpatient” treatment program—it is impossible to know whether it actually proposes to offer supportive services in dwelling units covered by the FHA, or in transient rooms more akin to a hotel or short-term corporate apartment which are not covered by the FHA. Nor can it be said, based on CCG’s description of the Proposed Use, whether CCG’s Proposed Use has the indicia of a “dwelling” recognized by the leading federal court case in Colorado, *St. Paul Sober Living*, 896 F.Supp. 2d 982 (D.Colo. 2012), a decision rooted in the fact that residents of an addiction recovery group home lived as the functional equivalent of a single family” in a residential neighborhood. CCG makes no representation as to how its clients will interact with one another, so it is not clear that the reasoning of *St. Paul* applies to the Proposed Use. Without more detail, it is impossible to conclude that the Proposed Use will qualify as a dwelling under the FHA.

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<sup>4</sup> 42 U.S.C. §3602(h)(FHA); 42 U.S.C. §12102 (ADA).

<sup>5</sup> Because Title II of the ADA applies only to “public entities,” it is not at all clear that that statute has any application to CMOA or CMD. See 42 U.S.C. §12132, which provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

<sup>6</sup> 42 U.S.C. §3602(b): “Dwelling” means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and construction or location thereon of any such building, structure, or portion thereof.

17. Does CPOA's and CMD's Appeal of the Director's Interpretation Constitute a Violation of the FHA or ADA?      Answer: No.

- a. I understand this matter arises from CCG's request of the Director for an interpretation of the Cordillera PUD as allowed by the Eagle County Land Use Regulations, and the Director's issuance of the informational administrative interpretation pursuant to the Land Use Regulations. I further understand that the Land Use Regulations allow CPOA and CMD to appeal the Director's administrative interpretation to the Commissioners.
- b. Just as CCG exercised its rights under the Land Use Regulations to obtain the Director's administrative interpretation, the CPOA and CMD have invoked their own rights to ascertain the official position of Eagle County with respect to the Proposed Use. The CPOA and CMD have not violated either the FHA or ADA in exercising those rights. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 508 n. 18 (1975)(commenting on citizens' options to use local legislative or judicial forums for appeal, noting that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process."). Were it otherwise, any party seeking the review of any low-level staff interpretation to a municipal planning commission, board of zoning appeal or local legislative body—and any party seeking declaratory judgment from, or review by, a state or federal court—would be liable for discrimination. That is simply not how the federal antidiscrimination statutes work. Rather, FHA and ADA claims may lie where a provider is required to comply with procedures applicable only to housing or services for people with disabilities. *See, e.g., Potomac Group Home v. Montgomery County, Md.*, 823 F. Supp. 1285 (D.Md. 1993. Here, CCG chose the forum (the Director) and the procedural path (a request for an informal interpretation), knowing full well that any Proposed Use employing that forum and that path would be subject to further review by the Board of Commissioners and—conceivably—a Colorado district court. Here, CCG cannot be heard to complain that it is being subjected to an unfair process, and its claims that CPOA or CMD have violated the FHA or ADA is simply without basis.
- c. As there has been no substantive decision made with respect to review of the Director's Determination, any claim by CCG that there had been a substantive violation of the FHA or ADA would be both unripe and purely speculative.

18. Do the Eagle County Commissioners Violate the FHA or ADA by Reversing the Director's Interpretation?     Answer: No.

- a. Without pointing to any actual evidence of discriminatory treatment, CCG's Memorandum cites to several FHA or ADA cases, and then suggests that the Commissioner's must "uphold the Director's interpretation because it is required to do so under the FHA and the ADA." But that is pure wishful thinking on CCG's part, and reflects an unfamiliarity with the operation of federal disability rights laws. It is not as if having a disability (or providing services to people with disabilities) entitles one to a "Go Free Card." Rather, like all other zoning and land use applicants, CCG must conform to the underlying requirements of the applicable land use regime which, in this case, is the PUD and the rules and procedures applicable to County interpretation and review of same.
- b. Unlike the cases cited in CCG's Memorandum, the appeal of the Director's interpretation does not involve the adoption of new legislative or regulatory restrictions in response to a proposal to house or serve people with disabilities. Instead, the County is simply responding—as it is required to do under Colorado law—to a request for review of a cursory determination by an unelected County official who has acknowledged that the provision he has interpreted is ambiguous and could be read contrary to his interpretation. This is not discrimination; it is merely the routine business of County government.
- c. Disparate treatment<sup>7</sup> cases under the FHA and ADA are analyzed under the burden shifting framework established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Under that framework, it is CCG's burden to demonstrate that the disabilities of its prospective clients—if, indeed, they have disabilities—were the motivating factor in any decision by the County to review the Director's determination. Were CCG to carry that significant burden, the County could defeat the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its action. Here, the detailed review process established by Colorado law and the requirement of due process implicit in zoning and land use decisions provide a clear and irrefutable justification for the County's review.
- d. In my opinion, so long as their action is not motivated by discrimination, and they do not depart from the normal procedural and substantive criteria used in such decisions, the Commissioners can, without FHA or ADA liability, reverse the Director's Interpretation on the basis that it was arbitrary, capricious, unsupported by law or fact, or because it ignored the longstanding legislative purposes of the Cordillera PUD and was incompatible with that regime.

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<sup>7</sup> CCG has made no claims of discrimination on the basis of the disparate impact doctrine, likely because it simply does not fit the facts of this case. It has identified no neutral policy of any entity that has a harsher effect on people with disabilities, and has provided no statistical or other evidence to support such a claim. Similarly, CCG has not requested a "reasonable accommodation" from any entity, let alone demonstrated how that accommodation would be reasonable or necessary under the circumstances.



19. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed on September 8, 2016, in Washington, D.C.

A handwritten signature in black ink, appearing to read "Michael Allen", written in a cursive style.

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Michael Allen

## **Exhibit 1**

### ***Curriculum Vitae* of Michael Allen**

# MICHAEL ALLEN

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Washington, D.C. 20016

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Office (202) 728-1888

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## **EDUCATION**

University of Virginia School of Law (J.D., 1985)  
Georgetown University (B.S., International Relations, 1979)

## **PROFESSIONAL EXPERIENCE**

**RELMAN, DANE & COLFAX, PLLC**, Washington, D.C.  
**Partner**, January 2010 to present; **Counsel**, June 2006 to December 2009

Litigate plaintiff-side discrimination cases involving housing, education, employment and long-term care.

**BAZELON CENTER FOR MENTAL HEALTH LAW**, Washington, D.C.  
**Senior Staff Attorney/Director of Housing Program**, 1995 to 2006

Litigated housing discrimination cases and conducted public policy advocacy in Congress, at federal agencies and with local elected officials concerning the housing needs of people with mental disabilities. Provided coalition leadership, co-counseling, litigation and research support, and technical assistance to public interest lawyers and other advocates on Fair Housing cases and issues. Responsible for extensive public speaking and writing on housing issues. Raised and administered an annual budget of more than \$300,000.

**BUILDING BETTER COMMUNITIES NETWORK**, Washington, D.C.  
**Co-Director**, 1998 to 2007

Direct the operations of a small national clearinghouse on strategies to overcome community opposition to housing and services for people who are poor, homeless or who have disabilities.

**LEGAL SERVICES OF NORTHERN VIRGINIA**, Falls Church, Virginia  
**Managing Attorney, Housing Unit**, 1990-1995

Managed the landlord-tenant and affordable housing advocacy cases and projects of a regional poverty law firm. Coordinated an informal clearinghouse on technical assistance available to nonprofit housing/shelter groups. Activities included: civil litigation in state and federal courts, state and local legislative advocacy, and community education and outreach. Recruited, trained and supervised the firm's housing attorneys, paralegals, community education worker and pro bono attorneys. Position required extensive knowledge of federal housing programs, including homeownership, foreclosure relief, multi-family development, HOME, preservation of federally assisted rental housing, and tenant-based assistance programs.

**Staff Attorney**, 1985-1990

Diverse civil litigation practice, including landlord-tenant, anti-displacement, foreclosure defense, disability, public benefits, worker's compensation, consumer and domestic relations law. Selected as Reginald Heber Smith Community Lawyer Fellow (August 1985). Practiced before federal and state courts and agencies. Maintained caseload of 75-100 cases. Chaired the firm's Housing Work Group.

## **TEACHING EXPERIENCE**

**AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW**, Washington D.C.  
**Adjunct Associate Professor**, 2003-2006

During the summers, I taught the Government and Public Interest Lawyering Externship seminar. During the spring semester, I taught the Housing Discrimination Law seminar.

**HOWARD UNIVERSITY SCHOOL OF LAW**, Washington, D.C.  
**Adjunct Associate Professor**, 2005-2006

Housing Discrimination Law seminar.

**UNIVERSITY OF VIRGINIA SCHOOL OF LAW**, Charlottesville, Virginia  
**Adjunct Faculty Member**, 1999-2004

Responsible for teaching classroom component of five-credit Housing Law Clinic course in conjunction with the Legal Aid Justice Center.

## **COMMUNITY AND POLITICAL ACTIVITIES**

**PATHWAYS TO HOUSING, D.C.**, Washington, D.C.  
**Founding Member and Chair, Board of Directors** 2004-present

**NATIONAL COALITION ON DISABILITY RIGHTS**, Washington, D.C.  
**Member, Board of Directors** 2003-2005

**YACHAD, THE JEWISH HOUSING AND COMMUNITY DEVELOPMENT CORPORATION**  
**Member, Board of Directors** 2003-2013

**LEGAL RESOURCE CENTER FOR NONPROFIT HOUSING SPONSORS**, Washington, D.C.  
**Founding Member, Board of Directors**, 1991-1996

**VIRGINIA HOUSING COALITION**, Richmond, Virginia  
**Vice President, Board of Directors**, 1992-1995

**WASHINGTON AREA COMMUNITY INVESTMENT FUND**, Washington, D.C.  
**Founding Member, Board of Directors**, 1986-1991

## **BAR ADMISSIONS**

Virginia State Bar (1985)  
District of Columbia Bar (1986)  
U.S. District Court for the Eastern District of Virginia  
U.S. District Court for the District of Columbia  
U.S. Court of Appeals for the Fourth Circuit

## **PUBLISHED OPINIONS**

Young v. District of Columbia Housing Authority, 31 F.Supp.3d 90 (D.D.C. 2014 )(denying motion to dismiss Section 504 and ADA claims against D.C. Housing Authority concerning failure to provide effective communications for people with hearing impairments).

Independent Living Center of Southern California v. City of Los Angeles, 296 F.R.D. 632 (C.D. Cal. 2013)(Disability advocacy organizations permitted broad discovery of program accessibility claims in civil rights litigation seeking enforcement of Section 504 and ADA accessibility in multifamily housing)

Independent Living Center of Southern California v. City of Los Angeles, 973 F.Supp.2d 1139 (C.D. Cal. 2013)(Municipal defendants' claims for indemnification and contribution barred in civil rights litigation seeking enforcement of Section 504 and ADA accessibility in multifamily housing)

National Fair Housing Alliance v. HHHunt, 919 F.Supp.2d 712 (W.D.Va. 2013)(continuing violation theory applied to architecture firm for noncompliant design and construction).

National Fair Housing Alliance v. S.C. Bodner Co., 844 F.Supp.2d 940 (S.D. Ind. 2012)(subsequent purchasers of covered multifamily dwellings may be liable for continuing to rent inaccessible units).

State of Connecticut Office for Protection and Advocacy v. State of Connecticut, 706 F.Supp.2d 266, (D.Conn. 2010)(Protection & Advocacy agency has standing to pursue claim under Title II of the Americans with Disabilities Act; class certified in case involving community integration of people with mental illnesses).

McNamara v. Ohio Bldg. Authority, 697 F.Supp.2d 820 (N.D. Ohio, 2010) (Title II of the Americans with Disabilities Act can impose non-discrimination obligations on private entities)

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Anti-Discrimination Center of Metro New York v. Westchester County, 495 F.Supp. 2d 375 (S.D.N.Y. 2007) and 668 F.Supp.2d 548 (S.D.N.Y. 2009) (False Claims Act and obligation to affirmatively further fair housing)

Clark v. Alexander, 894 F.Supp. 261 (E.D.Va. 1995), aff'd 85 F.3d 146 (4th Cir. 1996)(termination of rental subsidy).

Ellis v. Ritchie, 803 F. Supp. 1097 (E.D.Va. 1992)(termination of rental subsidy)

Evans v. Sullivan, 928 F.2d 109 (4th Cir. 1991)(attorney's fees under Equal Access to Justice Act).

## **HONORS AND AWARDS**

Reginald Heber Smith Community Lawyer Fellowship (1985-86)  
Wasserstein Public Interest Visiting Fellow, Harvard University School of Law (2005)

## **SELECTED PUBLICATIONS**

"The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients," 23-  
WTR J. Affordable Housing & Community Dev. L 231 (2015) (with Timothy M. Smyth, and Marisa Schnaith),  
available at [http://www.reلمانlaw.com/docs/AH23-2\\_05Smyth.pdf](http://www.reلمانlaw.com/docs/AH23-2_05Smyth.pdf)

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"No Certification, No Money: The Revival of Civil Rights Obligations in HUD Funding Programs," 78 *Planning  
Commissioners Journal* (Spring 2010), pp. 16-17, available at  
<http://www.reلمانlaw.com/docs/WestchesterArticle.pdf>

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of Age, 43 *Clearinghouse Review* 560 (March-April 2010)(with Craig Gurian), available at  
<http://www.antibiaslaw.com/sites/default/files/files/MakingReal.pdf>

"NIMBYism: Using the Fair Housing Act to Overcome Municipal Opposition," *Tax Credit Advisor* (April 2009), p.  
1, available at <http://www.housingonline.com/NewsArticle.aspx?NewsArticleId=103548>

*Transforming Housing for People with Psychiatric Disabilities Report*. HHS Pub. No. 4173. Rockville, MD: Center  
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[http://download.ncadi.samhsa.gov/ken/pdf/SMA06-4173/Housing\\_booklet.pdf](http://download.ncadi.samhsa.gov/ken/pdf/SMA06-4173/Housing_booklet.pdf)

"Increasing the Usability of Housing Choice Vouchers for People with Disabilities," 36 *Housing Law Bulletin* 111  
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"'For the Rest of Their Lives': Seniors and the Fair Housing Act," 90 *Iowa Law Review* 101 (October 2004)(with  
Robert G. Schwemm) available at [http://www.fhco.org/pdfs/lrc\\_rest\\_of\\_their\\_lives.pdf](http://www.fhco.org/pdfs/lrc_rest_of_their_lives.pdf)

Addressing Community Opposition to Affordable Housing Development: A Fair Housing Toolkit (Housing Alliance  
of Pennsylvania, May 2004)( with Sara Pratt), available at  
<http://content.knowledgeplex.org/kp2/cache/documents/68549.pdf>

"Let My People Go: The Promise of 'Deconcentration' for People with Disabilities," in *The NIMBY Report*  
(National Low Income Housing Coalition, March 2004), p. 26, available at  
<http://www2398.ssldomain.com/nlihc/doc/2003-2.pdf>

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Not to Use Housing as a Tool of Coercion," 21 *BEHAVIORAL SCIENCES AND THE LAW* 503 (July/August  
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"The Olmstead Decision: The Legal Framework," in *THE OLMSTEAD FACTOR: INTEGRATING HOUSING  
FOR PEOPLE WITH DISABILITIES/ The NIMBY Report* (National Low Income Housing Coalition, Spring  
2002), p. 6, available at <http://www.nlihc.org/doc/spring2002.pdf>

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Principal Author, THE WELL-BEING OF OUR NATION: AN INTER-GENERATIONAL VISION OF EFFECTIVE MENTAL HEALTH SERVICES AND SUPPORTS (National Council on Disability, September 2002), available at <http://www.ncd.gov/publications/2002/Sept162002>

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“Separate and Unequal: The Struggle of Tenants with Mental Illness to Maintain Housing,” 30 CLEARINGHOUSE REVIEW 720 (November 1996), available at <http://www.bazelon.org/LinkClick.aspx?fileticket=G6Nv3gIsUX8%3D&tabid=241>