

DISTRICT COURT, COUNTY OF JEFFERSON,
COLORADO

Court Address:
100 Jefferson County Parkway
Golden, CO 80403-8780

Plaintiffs:

CITY OF GOLDEN et al.

v.

Defendants:

**JEFFERSON COUNTY, BOARD OF COUNTY
COMMISSIONERS OF JEFFERSON COUNTY, and
LAKE CEDAR GROUP, L.L.C.**

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Case Number: 03CV3045

Div. 6 Ctrm.: 5-B

Case Number: 05CV3627

Div. 2 Ctrm.: ____

**Consolidated with Case No.
03CV3045 by November 7, 2005
Order in Case No. 03CV3045**

**ANSWER BRIEF OF THE CITY OF GOLDEN, CARE AND INDIVIDUAL
PLAINTIFFS FOR THE CONSOLIDATED 106 ACTIONS**

In May 2005, the Court remanded this matter to the County because the Record lacked evidence that the Lake Cedar Group (LCG) rezoning application satisfied the multi-tower failure (MTF) provision in the Jefferson County Zoning Resolution (ZR), and stated that:

If competent evidence is presented to the Board that tower set back is sufficient to prevent multiple tower failures from impacting occupied dwellings, *and the Board once again affirms the rezoning decision*, then the Court will lift the stay and deny a permanent injunction. If such evidence cannot be presented, then [the] Court will grant the injunction. 87R¹ (emphasis added).

These requirements were not met. The Board held two hearings and received additional evidence on the MTF issue. On this basis, the Board found that the application does not satisfy the MTF provision. It denied, 2-1, a motion to find that tower setback “is sufficient to prevent multiple tower failures from impacting dwellings occupied by persons other than the tower owner” (“Motion”) (5954-5R), and did not affirm the rezoning decision. Because neither of the two conditions of the Order has been met, the Court must grant the permanent injunction.

ARGUMENT

I. THE BOARD’S DETERMINATION THAT LCG DOES NOT COMPLY WITH SETBACK REQUIREMENTS FORECLOSES LCG’S ANALYSIS OF THIS CASE.

LCG refuses to acknowledge the implications of the denied Motion. It argues that the Board’s prior approval is still in force and that the Board had to reaffirm its prior approval *solely on the basis of LCG’s evidence*. LCG Br. at 2-5. This argument is flawed for several reasons.

A. The Court Cannot Assume the Board’s Role as Fact-Finder.

It is the Board, not the Court that is the fact finder in rezoning cases. *Routt Cty. v. O’Dell*, 920 P.2d 48, 50 (Colo. 1996). The Board’s decision must be upheld unless there is *no*

¹ The County began renumbering documents at number 1 after the second remand. For clarity, this Brief cites to pre-second remand documents as R. ___ and post-second remand documents as ___R. At the direction of Judge Jackson’s clerk, Plaintiffs have electronically filed each Record citation (and an index) as Appendix A hereto. Upon request, Plaintiffs will provide hard copies of these citations or a hyperlinked document to the Court or the parties.

competent evidence to support it, *id.*, even if contradictory evidence exists. *Sundance Hills Homeowners Ass'n v. Arapahoe Cty.*, 534 P.2d 1212, 1216 (Colo. 1975). Were the Board obligated to approve the Motion just because LCG presented *some* evidence on the MTF issue, it would be stripped of its responsibilities and relegated to the role of glorified court reporter. Thus, LCG cannot prevail by identifying *some* evidence in support or by questioning the credibility of Plaintiffs' witnesses. These are matters for the Board – not the Court.

B. LCG Wrongly Assumes that the Prior Approval is Still in Effect.

As a matter of law, the prior approval *cannot* still be in force. This Court has determined that there was no competent evidence on the MTF provision to support the prior approval. 87R (May 2005 Order); *Routt Cty.* 920 P.2d at 50. After considering the evidence received after the second remand, the Board denied a motion to find that the application satisfied minimum requirements of the ZR.² 5954-5R. This stands in stark contrast to the Board's action after the first remand, when it passed a Resolution reaffirming its approval. 4873-93R.

C. LCG Mischaracterizes the Scope of the Setback Requirement.

LCG tries to sidestep the Board's vote by arguing that the failed motion was "arbitrary and capricious because it did not apply the County's 'established setback criteria,'" which LCG alleges is 100% of tower height. LCG Br. at 10.³ On its face, this claim fails because it ignores evidence, discussed below, showing that the MTF Provision can be violated by debris falling within 100% of the radii of the HDTV, Channel 4 (KCNC), and Channel 7 towers ("Towers").⁴

² It is irrelevant that the Board did not pass a resolution, issue findings or revoke its earlier appeal. *Sundance*, 534 P.2d at 1216 (lack of findings or explanation of rationale not fatal because record contained supporting evidence).

³ This marks a change from LCG's prior, wholly unsubstantiated, argument that "the setback standard accepted by the County *and by the District Court* is a distance equal to 80% of the tower height." 5826R (emphasis added).

⁴ The Record demonstrates that the HDTV Tower is within the 100% radius of the Channel 4 Tower (511-12R, Exponent) and the Channel 4 Tower is within the 100% radius of the Channel 7 Tower. 38R & 2052R (Staff).

This claim also fails as a matter of law because there are no “established setback criteria.” LCG points only to staff views, not final Board determinations. Moreover, staff expressly recognized that the ZR “makes no distinction on fall radius, but rather concludes that a sufficient set back must be met. *Sufficient in this case, must meet the worst case scenario.*” R.9994 (emphasis added). The prior statements by the Zoning Administrator and staff, upon which LCG relies,⁵ merely identify *minimum* MTF setback requirements. They do not support the converse proposition: *i.e.*, that setback that *exceeds* 100% of tower height necessarily satisfies the MTF provision. LCG has not and cannot justify why the debris radius should be smaller than what LCG’s experts for its failed 1999 rezoning application indicated is possible (*e.g.*, 603R (Kline, 110% radius); 1102R (Mulherin, 110%)) and what has actually occurred during actual accidents (*e.g.*, 2470R, 116%⁶). Moreover, it is the Board, not LCG, which is charged with interpreting the ZR. *Platte River Env’tl Conserv’n Org. v. Nat’l Hog Farms, Inc.* 804 P.2d 290, 292 (Colo. App. 1990). Therefore, if there is *any* evidence that ice or debris could fall onto dwellings *outside the 100% radius of the Towers*, the Board could reasonably conclude that the MTF provision requires a setback of more than 100% of tower height for this rezoning application.⁷

⁵ See R.14362 (“*minimum* setback of a tower ... should be equal to the height of the tower”) (emphasis added); 5920R (setback should be “*no less than* the height of the tower”) (emphasis added).

⁶ At Cedar Hill, Texas, a 1,550 foot tower collapsed, catapulting a man 600 yards away, *i.e.*, 1800 feet. 2470R.

⁷ For these reasons, LCG’s estoppel argument, LCG Br. at 8-10, is unavailing. *Even if the County could be estopped from finding that the ZR prohibits a setback of more than 100% of tower height*, the Record contains evidence that existing and prospective dwellings within the 100% radius of the Towers would be endangered in the event of multi-tower failures. Thus, even if successful, the estoppel argument would offer LCG no relief. Moreover, LCG’s alleged reliance on the prior statements by the Zoning Administrator and staff as a firm interpretation of the County position is unreasonable. First, these statements merely identify minimum setback requirements. Second, LCG is well aware of expert conclusions that debris radius can exceed 100% of tower height. *E.g.*, 1097R; 598R. Third, LCG knows that it is the Board, not staff, which finally applies the Zoning Resolution. Indeed, throughout this case, staff has consistently recommended denial of LCG’s application. As a final matter, LCG’s expenditure of over \$ 1 million to lease and buy properties is not “detrimental reliance”. LCG has, of its own volition, purchased assets that can be later sold, possibly even at profit.

II. THE BOARD'S DECISION IS SUPPORTED BY COMPETENT EVIDENCE.

As of May 2005, there was insufficient evidence on the MTF provision. 87R. Thus, the Board's task was to consider whether new evidence, submitted after the second remand demonstrated compliance. As outlined below, Plaintiffs' experts, Messrs. Griffith, MacDonald, Barrett and Professor Olhoeft, testified that the setback(s) violated the MTF provision in at least four ways. 5866-71R (Griffith, forensic structural engineer); 5863-66R & 5871-72R (MacDonald, forensic structural engineer); 508R-518R & 569-73R (Exponent Reports); 5902-11R (Barrett, mechanical engineer); 5847-55R (Olhoeft, engineer and professor of geophysics).

A. Setback is Not Sufficient to Protect Homes in the 100% Debris Radius.

LCG claims to have addressed the setback requirement by its purchase or lease of homes within the 100% radius of the Towers.⁸ Nevertheless, LCG's assertion that all of the potentially impacted homes "will remain under [LCG] control until the proposed tower is constructed and the existing tower is removed" (5826-7R) is incorrect. First, the Votaw cabin (21219 Cedar Lake Rd.) is only 298 feet from, *i.e.*, within 32% of, the Channel 4 Tower. 469R. The LCG/Votaw lease prohibits any party from occupying the premises during the term of the lease, but permits LCG (as tenant) to commence the term of the lease at any point *or not at all*. 672-3R. Moreover, if commenced, the term of the lease is only two years (672R) and the Record establishes that the two towers could coexist for more than two years. *E.g.*, 5926R. Second, the Deeth residence (21139 Cedar Lake Rd) is only 272 feet from, *i.e.*, also within 32% of, the Channel 4 Tower. 469R. Mr. Deeth has the option to purchase back his property in August,

⁸ LCG claimed on August 9, 2005, that it had leased or purchased every home within the 100% radius of the Towers. 5826-7R; 5725R; 658-683R. On August 25, 2005, staff found that the MTF requirement was not met because LCG did not own the Reynolds home. 38R; 2052R. LCG bought the Reynolds home one day before the August 29, 2005 hearing. 710R.

2010. 953-66R (Option to Purchase). This can occur no matter what may happen to delay the construction of the HDTV Tower and the deconstruction of the Channel 4 Tower. *E.g.*, 5926-7R. Third, Plaintiffs presented evidence that LCG entered into side agreements that would permit the original residents to remain in their homes – despite the formal purchase agreements – during the period of danger. *E.g.*, 5848-9R & 5926-7R (testimony); 1676-9R (affidavits).

In addition, LCG cannot demonstrate that the setback of the HDTV Tower will be adequate to protect expected future homes within the 100% radius of the Towers. By its terms, the MTF provision is not limited to *existing* dwellings. R.16095. Moreover, the protective purpose of the ZR reasonably requires protection of property owners who have the right to build *and may build* during the period of danger. The Record establishes that such development is both planned and ongoing. For example, the City owns property within 100% of the Channel 7 tower and 110% of the Channel 4 Tower and plans to construct a dwelling on or sell the property for residential purposes (for which it is zoned). 5858R; 5861R; 1631R (map). In addition, Pat Jenkins is constructing a house within 100% of the Channel 4 Tower. 5913R; 163-5R; 2922-8R. Without purchasing all of the land zoned residential within the debris radius, LCG cannot demonstrate that dwellings cannot be impacted in the event of multi-tower failure. 5727R (map).

B. Setback is Not Sufficient to Protect Homes *Beyond* the 100% Debris Radius.

There is extensive evidence that tower debris radius can exceed 100% of tower height.⁹ *E.g.*, 1102R (Mulherin, 110%); 571R (Exponent, at least 110%)¹⁰; 2470R (incident, 116%); 1632R (incident, 150%); R.6313 (Jones, 168%). Bob Barrett testified that there are many homes

⁹ That LCG’s experts presented contradictory evidence or Plaintiffs experts made contradictory conclusions is irrelevant. *Arndt v. Boulder*, 895 P.2d 1092, 1095 (Colo. App. 1995).

¹⁰ Exponent’s reports have not “changed.” *C.f.* 5950R. The first report states that a debris radius of 60 to 80% is possible “though the debris radius could be larger.” 510R. The second report states that, based on a review of literature, a 110% debris radius is “the maximum *measured* debris field.” 571R (emphasis added).

within the 168% radius of the Channel 4 Tower that could be impacted in the event of tower fall. 5905-6R. To wit, the Clark home (824 Aspen Road) is occupied and is only 1036 feet from, *i.e.*, within 123% of, the Channel 4 Tower. 2921R; 436R; 662R. LCG has not purchased or leased this residence. 5826-7R (LCG testimony); 5725R (map). The Clarks also intend to build a dwelling within 110% of the Channel 4 Tower. 29-32R; 255R; 5927R. In addition, Jim Groth intends to occupy a dwelling within 116% of the Channel 4 Tower. 5927R. Because the Record establishes that debris can damage dwellings within the 168% radius of tower height, and existing and prospective homes lie within that radius, the Board could reasonably conclude that the MTF setback requirement was violated.

C. Setback is Not Sufficient to Prevent Debris Rolling onto Occupied Homes.

Plaintiffs have demonstrated that collapse of the Channel 4 Tower could bring down the HDTV Tower. 511-12R (Exponent Report). Professor Olhoeft also testified that debris from a multi-tower failure could roll or slide down onto occupied dwellings below. 5849-55R. *See also* 5845-6R (Hislop); 5846R & 5928R (Carney). The topography of the site is the critical factor. LCG would perch the HDTV Tower on the side of Lookout Mountain, so if it is struck by the Channel 4 Tower and falls toward the east, there would be “a substantial momentum getting it going downhill” towards dwellings below. 5850R. As the Stonebridge HOA President testified:

Our ... homes aren't located in those projected [80% or 100%] danger area circles. But what many two dimensional maps don't show and what apparently most of the applicant's experts have failed to take into account is that our homes are about a thousand feet lower in elevation than where the base of the new tower will be. This means that the land ... slopes downward at about an average 35% slope ... 5893R.

Professor Olhoeft's 3-D simulation model demonstrated multiple scenarios in which debris could roll into occupied dwellings, (5563R, 3047-8R, 3052R, 2296-7R, 3044R, 3030R, 3032R,

3034R); onto Colorado School of Mines housing (2293-4R, 3026R, 3029R, R.15560, R.15592); or onto the Stonebridge neighborhood (3045-6R, 5892-7R, 2295R). Olhoeft concluded “I think the debris will not just fall and stay within a radius of 100% or 80%.... On this slope they’ve got to roll down hill or slide down hill, much greater distances.” 5855R.

LCG assumes in response that debris will bury itself into the ground (5944R & 5947R), but this theory both contradicts evidence in the Record, *e.g.*, 2353R (tower debris in Illinois embedded into ground and then “bounced” into nearby field), and also fails to take into account the topography of Lookout Mountain. The proposed site is on a steep slope surrounded by rock outcroppings. R.23. The Board could easily conclude that tower debris would not likely burrow into bedrock, and would instead roll or slide downhill and impact occupied homes. The fact that debris in another tower failure did not roll away when it fell on the prairie (5944R, Rockford testimony), is neither relevant nor controlling.

D. Setback is Not Sufficient to Protect Xcel Towers and Nearby Homes.

Collapse of the HDTV or Channel 4 Towers could cause failure of Xcel transmission towers and lines, which are within the 100% radius of those towers. 631R (map); 1750R (model); 2901R (tower distances). This fact alone is sufficient to demonstrate a violation of the MTF provision.¹¹ The Record also establishes that the collapse onto the Xcel towers or lines could cause a cascading failure of the towers and lines in both directions from the break. 3018R & 3051R (photos); 570R (Exponent Report); 5844R & 5852R (Hislop); 5868-71R (Griffith); 5731R (City of Golden). Professor Olhoeft identified occupied homes that could be impacted in the event of cascading failure. 5853-5R (testimony); 2944-9R (3-D simulation model). The sole

¹¹ This Court has not decided whether the MTF provision applies to failures involving other towers *not owned by LCG*, like the Xcel towers. 5860R. That decision is solely for the Board. *Sundance*, 534 P.2d at 1216.

contradictory evidence is an e-mail from Mr. Schaller, an Xcel employee, asserting that cascading tower failure is “very unlikely”. 714R.¹² Mr. Schaller neither established expertise on cascading tower failure nor concluded that multi-tower failure could not cause cascading failure. Therefore, it would be reasonable for the Board to believe Plaintiffs’ experts and not Mr. Schaller. *Arndt*, 895 P.2d at 1095 (Board’s action reasonable despite conflicting evidence).

LCG’s final thrust is the claim that the MTF provision applies only to failures involving multiple *telecommunication* towers. 5949-50R.¹³ Since “telecommunication tower” is defined in the ZR, the use of the more generic term “tower” in the MTF is revealing. R.16095. *Tidwell v. Denver*, 83 P.3d 75, 81 (Colo. 2003) (words are given their plain, ordinary meaning). It is absurd to argue that the ZR only protects homes from failures involving two telecommunication towers, but not from incidents involving a telecommunication tower and an electric tower.

E. LCG has Not Demonstrated that the Evidence Cannot Support the Board’s Vote to Deny the Motion.

LCG identifies only two sources of evidence as the basis for its claim that the Board *must* reapprove the rezoning application. LCG Br. at 4-5. First, its expert, Mr. Malouf, examined three tower-failure scenarios (the period of concurrent towers; during erection of the HDTV Tower; and during dismantling of the Channel 4 Tower) and concluded that no injury would occur to non-LCG property under any of these scenarios. 688-92R. Second, LCG leased or purchased homes within the 100% radius of the Towers (658-83R; 938-66R) and staff made a preliminary conclusion that this action was sufficient to satisfy the MTF. 5920-21R. However,

¹² It is not surprising that Schaller qualified his statements. Xcel was in the process of settling a suit involving a failed power line that struck a tree and caused a large wildfire in Boulder County, despite Xcel’s rerouting of that line to ensure that it would be sufficiently set back to prevent fires. *See* 5936R.

¹³ LCG’s argument rests in part on the analysis of Section 7(b) of the ZR. 5949R. Plaintiffs note that Section 7 is the regulation currently in effect, and not the regulation applicable to this case. R.15021 (Court transcript); R.16037-97 (applicable regulations).

LCG's evidence does not rebut all of Plaintiffs' evidence and the Board could reasonably find – *and did actually find* – Plaintiffs' evidence more compelling.

III. PLAINTIFFS' EVIDENCE IS WITHIN THE SCOPE OF THE REMAND.

This Court directed the Board to receive evidence on whether the setback of the HDTV Tower is “sufficient to prevent multiple tower failures from impacting occupied dwellings.” 87R. The Board could reasonably conclude that Plaintiffs' descriptions of multi-tower failures (*e.g.*, debris roll and cascading tower failure) were contemplated by the MTF provision and, therefore, were within the limited scope of the remand. *Routt Cty.*, 920 P.2d at 52 (Board deserves deference). In addition, Plaintiffs did not “invent any new arguments.” *C.f.* 5948R (LCG testimony). They presented relevant evidence prior to the second remand on each of their arguments, including damage to transmission towers (*e.g.*, R.13057-8 (June 2004), R.14821 (Nov. 2003), R.3335 (April 2003); and Complaint at ¶51); debris roll (*e.g.*, R.15799-803 & 15265-6, 2004 hearings), and debris radii exceeding 100% (*e.g.*, R.15224 & R.2004-21 (July 2003)). Plaintiffs' evidence is therefore within the scope of the remand.¹⁴

IV. THE MULTIPLE TOWER FAILURE CLAIM WAS PROPERLY RAISED.

Plaintiffs' MTF claim is properly before the Court. Plaintiffs were never required to recite the *entire text* of the setback provision in order to give notice of this claim. C.R.C.P. 8(f); *Lyons v. Hoffman* 502 P.2d 980, 982 (Colo. App. 1972) (pleadings liberally construed, with all doubts resolved in favor of the pleader). The express mention of “Section 17.F.2.b.2” in paragraph 51 necessarily includes the MTF provision. *Id.* Moreover, this is the law of the case. The Court recognized the MTF claim and issued a remand on this issue. 84-5R (Court Order);

¹⁴ Moreover, LCG has unclean hands on this issue. *E.g.*, 5835R (LCG opening testimony re: nonconforming uses). *See Salzman v. Bachrach*, 966 P.2d 1263, 1269 (doctrine of unclean hands).

Civil Serv. Com'n v. Carney, 97 P.3d 961, 966 (Colo. 2004) (law of the case includes court's conclusions and rulings logically necessary to sustain those conclusions). Finally, contrary to LCG's suggestion (LCG Br. at 6), Plaintiffs were not required to argue this issue in the preliminary injunction hearing. *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982) (moving party must demonstrate a probability of success on one claim; it need not bring entire case).

There is no question that Plaintiffs put LCG and the County on notice of the MTF claim both prior to the commencement of the case, *e.g.*, R.12459-62 (Aug. 2002); R.3303-4 (April 2003); R.3335-3337 (April 2003), and also after filing the Complaint, *e.g.*, R.14823-4 (March 2004); R.13057 (June 2004). The fact that LCG only now alleges that the claim was never properly before the Court is suspect. LCG admits that it knew of the MTF argument as of October 5, 2004. LCG Br. at 6-7. Why then did it wait 1 ½ years, respond on the merits to the MTF claim (LCG Ans. Br., February 28, 2005), remain silent through the second remand *and* a second round of hearings, and fail to raise the issue in its own 106 Complaint? LCG has certainly waived the right to raise this claim now. *Cox v. Pearl Inv. Co.*, 450 P.2d 60, 61-2 (Colo. 1969) (arguing merits without raising objection constitutes waiver.)

CONCLUSION

The Record contains competent evidence demonstrating that the MTF provision is violated in many ways. Although LCG's experts presented evidence, it was reasonable for the Board to deny the Motion on the basis of other, competent evidence. *Routt Cty.*, 920 P.2d at 50. Since the ZR does not allow the Board to approve an application if it cannot find that the MTF provision is met, this Court must, as a matter of law, issue a permanent injunction against the issuance of permits and approvals, and against construction and operation of the HDTV Tower.

Respectfully submitted this 12th day of April, 2006.

For the City of Golden:

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Original signature on file

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For the Individuals, Homeowner Associations and Corporate Plaintiffs:

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/s/ Deborah Carney
Deborah Carney

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the **ANSWER BRIEF OF THE CITY OF GOLDEN, CARE AND INDIVIDUAL PLAINTIFFS FOR THE CONSOLIDATED 106 ACTIONS** and **APPENDIX A** thereto were electronically filed this 12th day of April 2006, via LexisNexis, and duly signed originals were kept on file; and on the 12th day of April, 2006 copies were electronically served via LexisNexis to the following:

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