

<p>DISTRICT COURT, JEFFERSON COUNTY, COLORADO</p> <p>1<sup>st</sup> Judicial District Court Jefferson County Court &amp; Administrative Facility 100 Jefferson County Parkway Golden, CO 80401-6002</p> <hr/> <p><b>Plaintiff(s): CITY OF GOLDEN; CANYON AREA RESIDENTS FOR THE ENVIRONMENT, INC.;</b> <b>PARADISE HILLS HOMEOWNER ASSOCIATION; STONEBRIDGE AT EAGLE RIDGE MASTER OWNER’S ASSOCIATION;</b> <b>PACIFIC MILLIMETER PRODUCTS, INC.;</b> <b>MONNIE ELIZABETH AND M. ROBERT D. BARRETT; EDDIE and CHERYL ALIANIELLO;</b> <b>JAMES and CHRISTINA SHEA; GUENTER GROTHER; DR. RON LARSON; BRENT AND ELLIE ANDERSON; HAL and MARY SHELTON;</b> <b>ROGER and EVA COLTON; JEAN and PAUL QUENEAU; ROGER MATTSON; KATHLEEN A. SANDER and GARY OLHOEFT; MARTSON and THERESA SHELTON</b></p> <p><b>Defendant(s): JEFFERSON COUNTY, BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY; and LAKE CEDAR GROUP, L.L.C.</b></p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> <p>Case No. 03 CV 3045</p> <p>Division 6, Courtroom 5-B</p>
<p><b>ORDER</b></p>	

This case returns once again to this Court. Lake Cedar insists that the Court must affirm the Board’s 2003 rezoning decision, despite the most recent vote of the majority of the Board. The plaintiffs and the Board insist that because of the most recent vote the Court must now permanently enjoin the construction of the proposed tower. The Court does not agree with either position.

As indicated in previous orders, the Court’s role in this case is limited to a review of the record of proceedings before the Board and a determination, based on that record, as to whether the Board exceeded its jurisdiction or abused its discretion in reaching whatever decision on the merits that it reached. C.R.C.P. 104(a)(4). The Court is required to uphold the decision of the Board unless there is no competent evidence in the record to support it. *See, e.g., Ross v. Fire and Police Pension Ass’n*, 713 P.2d 1304, 1309 (Colo. 1986). “No competent evidence’ means that the governmental body’s decision is ‘so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.’” *Ibid.*

The Court’s second remand order, issued May 4, 2005, stated in pertinent part:

If competent evidence is presented to the Board that the 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 Court will grant the injunction.

Competent evidence was presented that multiple tower failures would not impact dwellings occupied by anyone other than Lake Cedar. The County's planning and zoning provided such evidence. Record at 5220R, ll. 28-32. Lake Cedar's structural engineer provided similar evidence. Record at 5830R, ll. 8-10 and 689-90R. A significant factor was that Lake Cedar, by its evidence, had acquired or leased all dwellings within the range of what theoretically could be impacted by a multiple tower failure. According to Lake Cedar's evidence, no one who is not associated with Lake Cedar will occupy any of these dwellings until the new tower is erected and the existing towers are removed.

The Board and the plaintiffs assert in their response to Lake Cedar's motion that competent evidence was also presented that multiple tower failure could still impact occupied dwellings. The Court disagrees. The contrary "evidence" consists largely of statements of counsel and speculation that Lake Cedar might have cut some side deals that would permit homeowners in the potential impact zone to remain in their homes, or that homeowners might force themselves back into the impact zone upon the expiration of leases. Neither a lawyer's argument nor speculation constitutes competent evidence. The Court has compared the actual deeds and leases with the parties' comments about them and finds that the documents are consistent with Lake Cedar's characterization.

The plaintiffs' brief asserts that it is possible that even if collapsing towers cannot impact an occupied dwelling, it is possible that debris from such a disaster could roll or slide downhill and reach an occupied dwelling. Setting aside the speculative nature of this "evidence," the Court is satisfied with the conclusion of the Board's staff, Record 5921R, ll. 6-9, and the Board itself in its brief at 4-5, that a reasonable setback requirement is 100% of the height of any of the potentially involved towers. The Court is similarly unpersuaded that speculation that a collapsing tower could possibly cause an Xcel transmission line or tower to fail, which in turn could possibly cause some impact to occupied dwellings outside the 100% setback area, constitutes "competent evidence." Even were these scenarios involving debris or an Xcel transmission line considered to be "competent evidence," however, there is no indication in the record that they had anything to do with the Board's majority vote.

There is also a suggestion that an individual who owns land within the potential impact zone might build and occupy a home within that zone while construction is in process, and that the City of Golden might sell property within the impact zone for residential development. Competent evidence cannot be manufactured by one who would intentionally put himself in harms way.

If in the future Lake Cedar were to permit any individuals other than those associated with Lake Cedar to occupy any existing building within the potential zone of impact from a multiple tower failure, then this would be contrary to Lake Cedar's statements, contrary to Lake Cedar's evidence, and grounds for an immediate injunction and potentially other sanctions. However, there is no competent evidence in the record supporting a finding that there are, or likely to be, occupied buildings that could be impacted by a multiple tower failure scenario.

At the conclusion of the hearing Commissioner McCasky moved "that the Board find that the tower set back is sufficient to prevent multiple tower failures from impacting dwellings occupied by persons other than the tower owner." Rec. 5817R at 23-25. The motion failed on a two to one vote. Rec. 5955R at 4-9. The Court finds that the majority's vote is not supported by competent evidence in the record.

That does not, however, resolve the case. The remand order instructed that if competent evidence were presented that multiple tower failure would not impact occupied dwellings, "*and the Board once again affirms the rezoning decision*" (emphasis added), the Court would lift the stay and deny a permanent injunction. The message was, and is, that the Board must either affirm or reject the proposed rezoning. The Board is entitled to make the decision, but it is also obligated to make the decision.

During the long period of time that this matter has been pending the composition of the Board has entirely changed. That, however, is simply the result of the political process. Had the record been complete at the time the prior Board voted on the proposed rezoning, this matter may long ago have been concluded, and the tower might well have been constructed. However, that did not happen. The three gentlemen who occupy those seats today are charged with the authority and responsibility to make the decision.

There does not appear to be a need for additional evidence. The record is voluminous, and all interested parties on both sides of the debate have been given an ample opportunity to be heard. The responsibility of the Board now is to review the record and then to make a decision on the proposed rezoning. Whatever decision is made must be supported by an explanation of the basis of the decision, which need not be expressed in legalistic terms. *See Sundance Hills Homeowners Assn. v. Board of County Commissioners*, 534 P.2d 1212, 1216 (Colo. 1975). Only by that means can the interested parties know what the reasons for the decision were. Likewise, only by that means can whichever party is aggrieved by the decision, and ultimately the Court, make an informed decision as to whether the record contains competent evidence supporting the decision. So long as there is competent evidence, it makes no difference that there may be competent evidence to the contrary. The Court will affirm whatever decision is made, so long as it can be shown that there is competent evidence in the record that supports the decision.

It is surely frustrating to all interested parties that this matter continues to drag on. However, this decision, which will impact the public one way or the other, must be made

correctly and in a manner that the public can understand, even if not everyone agrees with it.

Lake Cedar's request for oral argument is denied. The case is remanded to the Board for a third time. Whether the Board takes further argument or evidence is for the Board to determine. The Court directs the Board to proceed with all due speed to bring this matter to a conclusion.

Dated in Golden, Colorado this 23<sup>rd</sup> day of May, 2006

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Brooke Jackson", with a long, sweeping flourish extending to the right.

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R. BROOKE JACKSON  
District Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the 23rd day of May, 2006, I caused a true and accurate copy of the above and foregoing document to following via the method indicated:

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