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Appeal from:
18th Judicial District
Douglas County District Court
Honorable Shay K. Whitaker
Case Number 2018CV30050

Plaintiffs/Appellants:

IRONSTONE CONDOMINIUMS AT STROH RANCH OWNERS ASSOCIATION, INC. AND STROH RANCH COMMUNITY ASSOCIATION, INC.

vs.

Defendants/Appellees:

TOWN OF PARKER PLANNING COMMISSION; TOWN OF PARKER; AND PARKER LEASED HOUSING ASSOCIATES I, LLLP.

COURT USE ONLY

Court of Appeals
Case Number: 2019CA34

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APPELLANTS' REPLY TO THE TOWN OF PARKER AND THE TOWN OF PARKER PLANNING COMMISSION'S AMENDED ANSWER BRIEF AND THE PARKER LEASED HOUSING ASSOCIATES I, LLLP'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in the C.A.R. 28(g) or C.A.R. 28.1(g).

☒ It contains 5,595 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with C.A.R. 28(a)(1)-(3) and contains a certificate of compliance, table of contents and table of authorities

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ M. Stuart Anderson

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INTRODUCTION

This is Appellants' (the "Stroh Ranch HOAs") reply to the Town of Parker's ("the Town") Amended Answer Brief and the Parker Leased Housing Associates I, LLLP's ("the PLHA") Answer Brief. The Stroh Ranch HOAs submit this Reply and hereby incorporates their Opening Brief by reference herein.

ARGUMENT

A. The Town Abused Its Discretion When It Approved SP16-108 Because in Doing So It Acted in Excess Of Its Jurisdiction, It Acted In An Arbitrary And Capricious Manner, And It Misapplied And Misconstrued The Law.

1. The Standard of Review for the Town's Findings Includes Abuse of Discretion. In Determining Whether the Town Abused Its Discretion, there are Portions of the Town's Decision that Must be Reviewed *De Novo.*

The Town states that the standard of review for C.R.C.P. 106 appeals is abuse of discretion. This is an incomplete statement of the law. C.R.C.P. 106(a)(4) states that the decisions of governmental bodies, taken in the course of the exercise of that body's judicial or quasi-judicial functions, are reviewed for a "**determination of whether the body or officer has exceeded its jurisdiction**

or abused its discretion based on the record before the defendant body or officer." C.R.C.P. 106(a)(4)(I).

It is also true that the determination of whether a governing body has exceeded its jurisdiction or abused its discretion encompasses the *de novo* review of a governing body's findings involving questions of the interpretation and application of laws, including municipal law.

"[I]**n determining whether the governmental agency abused its discretion or exceeded its jurisdiction, the reviewing court in a C.R.C.P. 106(a)(4) proceeding considers whether the governmental body misconstrued or misapplied the law.** ***See Giuliani,*** **¶ 39, 303 P.3d 131. In doing so, the reviewing court reviews questions of law, such as the interpretation of a statute, de novo.** ***Stevinson*****, 143 P.3d at 1101."** Friends of the Black Forest Pres. Plan, Inc. v. Bd. of Cty. Commissioners of El Paso Cty., 2016 COA 54, ¶ 15, 381 P.3d 396, 400 (de novo review applied to board of county commissioner's interpretation and application of law in its land use decision).

This C.R.C.P. 106 appeal involves the Town's interpretation of Town laws and the application of said laws in the approval of a site plan for a development (SP16-108). Therefore, the Town's findings and conclusions in that regard are

reviewed *de novo* according to objective legal standards to determine whether the Town abused its discretion.

The case law is clear that when a reviewing court is reviewing legal determinations by the governing body, such as the interpretation and application of municipal laws, then abuse of discretion is determined by a *de novo* review of the governing body's legal determinations. The reviewing court is not "bound" by the legal interpretations or determinations of the governing body because the review is *de novo*. Alpenhof, LLC v. City of Ouray, 297 P.3d 1052, 1055 (COA 2013) ("**Interpretation of a city code is reviewed *de novo*, applying ordinary rules of statutory construction**"); Commerce City v. Enclave West, Inc., 185 P.3d 174, 178 (Colo. 2008) ("**a court may defer to a governmental body's statutory construction, but is not bound by that construction because review is de novo; courts look to rules of statutory construction and common sense meaning**"). "**To properly construe a municipal ordinance, we must turn to the rules of construction applying to statutory provisions.**" Town of Erie v. Eason, 18 P.3d 1271, 1275 (Colo. 2001). If a reviewing court finds that the governing body erroneously interpreted the law, the presumption of validity and regularity is overcome, and the governing body's actions constitute an abuse of discretion.

C.R.C.P. 106 is the only check and balance afforded citizens and groups on the power of governing bodies. The Town's constrained reading of the power of review vested in the judiciary to provide a check on a governing body's legal determinations would render the judiciary's independence and powers of de novo review meaningless. "**De novo review means "anew; afresh; a second time." *Black's Law Dictionary* 392 (5th ed.1979). Indeed, appellate courts can and should review anew the question of whether a trial court reached the correct conclusion of law, or the right of appeal would be essentially meaningless.**" Valdez v. People, 966 P.2d 587, 598 (Colo. 1998). Accordingly, when determining whether the Town abused its discretion concerning legal determinations such as the interpretation of laws and their application, this reviewing court may exercise the independence granted to the judiciary in our system of checks and balances. *De novo* review is essential to the independence of the judiciary.

2. The Town's Interpretation that Ironstone Way was a Public Street under Town Code Section V.1.D.4 was not Supported by the Law or the Record.

The Town's entire argument can be reduced down to the premise that any drive, street, or other road that has any public use, regardless of whether it is on private property, is a public street under Town Code Section V.1.D.4. The pertinent section of the Town's Code reads as follows:

"Multi-family development sites between 5 and 15 acres shall include a minimum of one public street or private drive, with detached sidewalks and tree lawns, that is continuous through the site and connects to a public street on both ends (referred to as a through access drive)." Town Code Section V.1.D.4. [CF p. 219].

Does the Town Code define a public street as "any street, even ones on private property, with any public use whatsoever"? No, it doesn't. In fact, there is no definition in the Town Code that would permit the Town to deem a private road, on private property, to be a "public street".

"Generally, we presume the disjunctive use of the word "or" marks distinctive categories." Lombard v. Colorado Outdoor Educ. Ctr., Inc., 187 P.3d 565, 571 (Colo. 2008). The PLHA argues that the Town reasonably interpreted Code Section V.1.D.4 so as to make Ironstone Way a public street because it is open to public use despite the fact that Ironstone Way is on private property and has been officially designated by the Town of Parker as a "private drive" since 2004. The PLHA seeks to create an exception for private drives with public uses that cannot be found in the plain language of the Town Code. **"The court will not create an exception to a statute that the plain language does not suggest or demand."** Slack v. Farmers Ins. Exch., 5 P.3d 280, 284 (Colo. 2000).

The context of the Town's interpretation of Code Section V.1.D.4 is that of a through access drive running through a development. A through access drive is defined by the Town Code as "**one public street or private drive, with detached sidewalks and tree lawns, that is continuous through the site and connects to a public street on both ends (referred to as a through access drive)**." A through access drive, connected at both ends to public streets, running through a development would by necessity always have multiple public uses such as delivery of mail, school bus access, police access, fire department access, census taker access, and other public access to the through access drive. The Town of Parker, in its Amended Answer Brief at p.18, relies on some of these same examples of public uses as a basis for its interpretation that Ironstone Way is a public street under the Town Code.

Therefore, under the PLHA's and the Town's interpretation, it follows that because all through access drives would have some public uses, then all through access drives would be public streets. This interpretation would render the words "private drives" in Code Section V.1.D.4 completely superfluous. The Town Code states that a through access drive can be either a private drive or public street that connects to a public street. However, under the PLHA's and the Town's expansive interpretation of what constitutes a public street, there would be no more private through access drives because, by definition, through access drives would have

public uses. In reviewing, *de novo*, the Town's legal interpretation of a town law and its application are subject to the rules of statutory construction.

> "**In addition to the rules of statutory construction already recited, when examining a statute's plain language, we give effect to every word and render none superfluous, *e.g., Slack v. Famers Insurance Exchange,* 5 P.3d 280, 284, because "[w]e do not presume that the legislature used language 'idly and with no intent that meaning should be given to its language,' " *Carlson v. Ferris,* 85 P.3d 504, 509 (Colo.2003) (quoting *People v. J.J.H.,* 17 P.3d 159, 162 (Colo.2001).**" Colorado Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 597 (Colo. 2005).

A "**statutory interpretation leading to an illogical or absurd result will not be followed**." Frazier v. People, 90 P.3d 807, 811 (Colo. 2004).

The Town's interpretation of Ironstone Way as public street for purposes of Code Section V.1.D.4 is at odds with the Town's official designation of Ironstone Way.

A C.R.C.P. 106 reviewing court reviews *de novo* the interpretation of a governing body's laws. In this case, the record does not contain the definition, if any, actually used by the Town. Had the Town expressed whatever definition it was actually using, if any, then some deference might be shown to that definition. The Town argues now that it was using a "public use" definition to interpret Town Code Section V.1.D.4 at the time the decision was made. However, the actual record only reflects that potential public uses were discussed by the Town attorney

and nothing more. The Town Planning Commission did not adopt any interpretive definition in the minutes or in the transcript records that delineated why the term "private drive" had one meaning on Town sanctioned plats but that very same term had an entirely different meaning when applied to Town Code Section V.1.D.4. The inconsistent application of the very same terms by a governing body is the essence of the phrase arbitrary and capricious and is an anathema to the rule of law. This is particularly true when the governing body has failed to furnish a definition for the term in its laws or in its decisions that provides a justification to apply the same term inconsistently in its acts.

Even if you assume that the Town Planning Commission made an implied interpretation of Town Code Section V.1.D.4 so as to distinguish the Town's designation of Ironstone Way as a "private drive" in the 2004 Plat from a "private drive" in Town Code Section V.1.D.4, the implied interpretation suggested by the Town on appeal is not supported by the record or the plain language of the Town Code. At the time the Town's Planning Commission applied Code Section V.1.D.4, the official status of Ironstone Way was that it was 'private drive" by virtue of the recorded plat designation. Therefore, the term "private drive" on the plat should have been plugged into the term "private drive" in Town Code Section V.1.D.4. The Town's Planning Commission's disparate use of the term "private drive" was not supported by the record and any implied interpretation of the law

permitting the disparate treatment of the term was not supported by the plain language of the Town Code.

Further, the Town had previously designated Ironstone Way as a "private drive" on the recorded 2004 Plat for Ironstone. [CF p. 167]. The fact that the language on the recorded Plat approved by the Town uses the exact same language, "private drive," contained on Town Code Section V.1.D.4, particularly in the absence of a definition otherwise, establishes that Ironstone Way was a private drive. "**By the recording of the plat and the dedication, all subsequent purchasers were charged with notice of the existence of the easements, which were appurtenances to plaintiff's tract as well as all others.**" Page v. Lane, 120 Colo. 416, 418-419, 211 P.2d 549, 550 (1949). It is well established that an easement accepted by a municipality is limited in use to the purposes set forth in the plat. Turnbaugh v. Chapman, 68 P.3d 570, 573 (Colo. App. 2003).

i. The unrecorded 1997 Site Plan does not establish that Ironstone Way is a "Public Street" under Town Code Section V.1.D.4.

The Town points to the 1997 Site Plan as a basis for upholding the Town's approval of the 2017 Amended Site Plan. Ultimately, the 1997 Site Plan is a red

herring because of the Town's subsequent designation of Ironstone Way as a private drive on the 2004 plat.

Regardless, The Town concedes that the 1997 2nd Amended Site Plan was never recorded. However, the Town asserts that the Bixby case stands for the proposition that the 1997 unrecorded Site Plan overrides the subsequent recorded 2004 Plat. South Creek Assoc. v. Bixby & Assoc., Inc., 781 P.2d 1027 (Colo.1989).

The recording of the 2004 Plat established the general plan of development. Further, that plat established that Ironstone Way was a "private drive" as depicted on that plat. [CF p. 167]. The Bixby case does not apply, because the pertinent 1997 Site Plan was not recorded in the real property records nor was it approved through the formal land use approval process that was applied to the 2004 Plat by the Town.. "**By the recording of the plat and the dedication, all subsequent purchasers were charged with notice of the existence of the easements, which were appurtenances to plaintiff's tract as well as all others.**" Page v. Lane, 120 Colo. 416, 418-419, 211 P.2d 549, 550 (1949); see also Bolinger v. Neal, 259 P.3d 1259, 1270 (Colo. App. 2010) ("As a matter of law, a person who acquires an interest in real property is on constructive notice of all prior filings concerning that property.").

Again, the 1997 Site Plan with amendments does not address the separate requirements of a through access drive mandated by the Town Code that were to be applied in 2017. Even if the 1997 unrecorded Site Plan, including its amendments, created some right to construct a drive, that right would still only be the right to create a private drive, at best, as recognized by its designation as such by the Town on the 2004 Plat. Because Ironstone Way was a "private drive" the through access drive requirements applicable in 2017 could not be met by the applicant. The 1997 Site Plan with Amendments is a red herring.

ii. Ironstone Way is not a public road created by 20 years or more of prescriptive, public use pursuant to C.R.S. §43-2-201(1)(c).

The Town points to C.R.S. §43-2-201(1)(c) as grounds to conclude Ironstone Way is a public street. The Town correctly states the elements applicable to C.R.S §43-2-201(1)(c) as "Continuous, open, notorious, and adverse use by the public, along a well-defined path across plaintiffs' property for a period in excess of twenty years or more." Lovvorn v. Salisbury, 701 P. 2d 142, 143 (Colo. App. 1985).

There is no competent evidence in the record that could establish that Ironstone Way had been used in any manner for 20 years when the pertinent 2017 decision was made by the Town because Ironstone Way did not exist in

1997. The 1997 Site Plan does not identify an "Ironstone Way". The first time Ironstone Way is identified by the Town is on the 2004 recorded Plat.

Any alleged prescriptive period could only have begun to run when Ironstone Condominiums was first developed. Therefore, any prescriptive period has not run because Ironstone Condominiums' private right to Ironstone Way began 14 years ago when the association's covenants and corresponding Plat Map were recorded. [CF p. 167; EX Env 2, ii. TRAKiT file #SP16-108 attachments/ Stroh Ranch F1 AMD2 L5 PC Staff Report_11.09.17_Complete (4400-4715) p.4 (4403) and EX Env 2, ii. TRAKiT file #SP16-108 attachments/ Stroh Ranch F1 AMD2 L5 PC Staff Report_12.14.17_Complete (4716-4733) p. 11 (4726) - Staff Reports references that the Town approved the Condominium Plat for Ironstone on April 19, 2004]. There was no entity against which the prescriptive period could begin to run 20 years prior to the 2017 decision by the Town.

The Town must take overt actions that provide notice of the public's claim of right so as to commence the prescriptive period: "**The public entity claimant ... must take some overt action or actions that give the property owner notice of the public's claim of right order for the prescriptive**

period to commence running under section 43-2-201(1)(c).” McIntyre v Gunnison County, 86 P.3d 402, 413-414 (Colo. 2004).

The Town argues that the 1997 Site Plan is the same thing as a map of the Town's road system and that it establishes Ironstone Way as a public easement. The 1997 Site Plan is not a map of the Town's road system; it is merely a site plan specific to the development area in question.

The area on the 1997 Site Plan that would later be part of where Ironstone Way was constructed is identified on the 1997 Site Plan as an "access and utility easement". It is well established that an easement accepted by a municipality is limited in use to the purposes set forth in the plat. Turnbaugh v. Chapman, 68 P.3d 570, 573 (Colo. App. 2003). Here, the 1997 Site Plan clearly states: "**The portions of real property that are labelled as utility easements or access and utility easements on this Plat are for the installation of maintenance and utilities and drainage facilities including, but not limited to, electric lines, gas lines, telephone lines, together with a perpetual right of ingress and egress for installation, maintenance, and replacement of such units; said easements and rights are to be utilized in a responsible and prudent manner.**" [EX Env. 1, Table of Contents\1. Documentary Evidence\B. Notebook from Nov 9, 2017 PC mtg\Public

Hearing_SP16-018 Stroh Ranch Filing No. 1, Amend No. 2, Lot 5 Site Plan Amend Docs of Record (463-747) p. 73 (535)]; Plat Map [CF p. 166-205].

Any purported Town approvals pertaining to the area in question identified the area as an "access and utility easement" to be used specifically for the purposes set forth on the 1997 Site Plan - none of which are for general ingress and egress for real estate development. See Turnbaugh, supra, 68 P.3d 570 at 573). Further, it is undisputed that the Town has not maintained Ironstone Way or contributed to its maintenance costs; nor has the PLHA or its predecessors-in-interest. Again, the Town specifically classified Ironstone Way as a private drive, as seen on the 2004 Plat Map, and it again acknowledged the same in its staff report, which actions run directly contrary to the "overt act" argument advanced by the Town. This completely negates the Town's "overt act" argument because the overt act of the Town is expressed on the recorded 2004 Plat approved by the Town. If the Town overtly identified Ironstone Way as a private drive, then it is impossible for any 20-year prescriptive period to have started to run on or before that date.

Finally, any use of Ironstone Way by reason of the 1997 Site Plan or other Town approved documents would only, at best, establish permissive use

since the Town approved documents that relate to the use of the land were submitted at the request of the landowner(s).

iii. The public did not obtain a prescriptive easement for the use of Ironstone pursuant to C.R.S. §38-41-101.

There was no competent evidence introduced by the Town or the PLHA to prove that the 18-year prescriptive use requirement could have been met. The same reasons stated *infra.*, concerning the 20-year prescriptive period under C.R.S. §43-2-201(1)(c) would apply. There is no evidence in the record as to when Ironstone Way was constructed. The first time the Town's record acknowledges the existence of Ironstone Way is on the 2004 plat which was only 13 years prior to the 2017 approval of the development. [CF p. 167].

The Town argues that the prior owner of lot 5A, first in 1986 with the Town approval of the first plat for Stroh Ranch and then on 1997 Site Plan, intended to grant the public use of Ironstone Way. There is no evidence in the record to support this. The 1987 Plat and the 1997 Site Plan do not reference "Ironstone Way" because it did not exist. The 1987 Plat and the 1997 Site Plan, to the extent that they can even be said to apply to Ironstone Way, do not reference a public street, public easement, or a public right-of-way.

Regardless, the recorded 2004 Plat designated Ironstone Way as a "private drive" and not a "public street" or "public easement".

iv. The PLHA's predecessors-in-interest did not take title to Lot 5A with an implied easement for the use of Ironstone Way.

The Town relies on certain conveyances by operation of law and other pertinent documents to support their implied easement theories.

For these implied easement theories, the developer was required to prove to the Town: (1) unity and subsequent separation of title; (2) obvious benefit to the dominant tenement and a burden to the servient tenement which existed at the time of the conveyance; (3) evidence that the common owner used the premises in an altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) necessity for the easement. Lee v. School District No. R-1, 164 Colo. 326,435 P.2d 232, 235-36 (1967).

There is no competent evidence in the record to show that there was a then-existing burden at the time of any pertinent conveyances. The third element is also not satisfied because a common owner did not use the premises in an altered condition. Even assuming these elements could be shown, there is no necessity for the easement because the project site clearly has access to and from J. Morgan Boulevard. See Thompson v. Whinnery, 895 P.2d 537, 540

(Colo. App. 1995) ("An implied easement of necessity for access to land arises when the owner of a tract of land conveys part of that tract to another, leaving either the part conveyed or the part retained without access except over the other part."). Indeed, an implied easement by necessity's "**assumed intent has its roots in considerations of public policy that militate against rendering a tract of land useless for lack of access.**" Id. That is not the case here because the project site has access via J. Morgan Boulevard.

Even if the PLHA's predecessors-in-interest to the vacant Lot 5A have a private easement over Ironstone Way, that does not mean that such private easement would encompass the expanded use of transforming Ironstone Way from a private drive into a public street. If your neighbor has an easement across your property, that does not mean your neighbor can force you to turn part of your land into a public street.

v. The PLHA's property does not include an easement for the use of Ironstone Way implied by a general plan of development.

The Town suggests that its actions in regard to the pertinent Lot 5A creates an implied easement. The recording of the 2004 Plat established the general plan of development because it was recorded, because it came the latest in time, and because it was the final pronouncement by the Town of the general developmental

scheme prior to the 2017 decision by the Town. The plat established that Ironstone Way was a "private drive" as depicted on that plat. [CF p. 167]. The 1997 Site Plan, including amendments, was not recorded in the real property records, nor was it approved through the formal land use approval process with the Town so as to qualify, under South Creek Assoc. v. Bixby & Assoc., Inc., 781 P.2d 1027 (Colo.1989), as being an easement by reason of a general plan of development. To the contrary, the pertinent recorded document, the 2004 Plat, established the general plan of development including the designation of Ironstone Way as private drive. [CF p. 167]. "**By the recording of the plat and the dedication, all subsequent purchasers were charged with notice of the existence of the easements, which were appurtenances to plaintiff's tract as well as all others.**" Page v. Lane, 120 Colo. 416, 418-419, 211 P.2d 549, 550 (1949); see also Bolinger v. Neal, 259 P.3d 1259, 1270 (Colo. App. 2010) ("As a matter of law, a person who acquires an interest in real property is on constructive notice of all prior filings concerning that property.").

vi. The PLHA property does not include an implied easement of necessity for the use of Ironstone Way.

Implied easements are to be disfavored by courts. Collins v. Ketter, 719 P.2d 731, 733 (Colo. App. 1986) ("**Generally, implied easements are not looked upon**

with favor by the courts."); See also State Dep't of Highways, Div. of Highways, State of Colo. v. Denver & Rio Grande W. R. Co., 757 P.2d 181, 183 (Colo. App. 1988), aff'd sub nom. State Dep't of Highways, Div. of Highways v. Denver & Rio Grande W. R. Co., 789 P.2d 1088 (Colo. 1990) (the need for an implied easement must be great and where alternative access to property is available necessity is not established). Further, access from J. Morgan Boulevard existed for LOT 5A at the time of the suggested severance of LOT 5 into LOTs 5 "A" and "B". Thus, at the time of the suggested severance there was no necessity for LOT 5A to have an easement across Ironstone Way because it had access for ingress and egress from J. Morgan Boulevard.

vii. The Doctrine of Laches does not bar Appellants' from asserting that Ironstone Way is a private drive.

Laches required the PLHA predecessor-in-interest to prove the following: **"(1) full knowledge of the facts by the party against whom the defense is asserted, (2) unreasonable delay by the party against whom the defense is asserted in pursuing an available remedy, and (3) intervening reliance by and prejudice to the party asserting the defense. Hickerson, ¶ 12, 316 P.3d at 623."** Johnson & Johnson, 2016 CO 67, ¶ 16, 380 P.3d 150, 154.

There is no competent evidence in the record that would support a finding of laches under any of the required 3 elements. Under the Town's official document of record, the 2004 Plat, Ironstone Way was a private road. [CF p. 167]. This designation should have prevented the Town from approving the site plan for the development because the through access drive requirement could not be met if Ironstone Way was a private drive. It was only when the Town allegedly interpreted its Code to supply the missing definition for public streets, not previously codified prior to 2017, that the Stroh Ranch HOAs were required to assert their rights. The Stroh Ranch HOAs acted immediately to assert their rights. No one could reasonably conclude that there was any delay in the assertion of a fully known right and that there was reliance by the PLHA or its predecessors-in-interest to their detriment.

3. The Town's Approval of SP16-108 is not Supported by the Record

The Town argues that because its staff found the project was in compliance with the Code, then it follows that the Town could not have abused its discretion, exceeded its jurisdiction, or acted in an arbitrary and capricious manner. The Town is arguing that because its staff made conclusory recommendations in staff reports, no actual findings or legal interpretations are required from the governing body itself. If the staff reports are as determinative as the Town suggests, then the

fact that the staff reports expressly state that Ironstone Way is a "private road" is at complete odds with the implied finding, being urged by the Town on appeal, that Ironstone Way was a "public street". [Staff Report, EX Env. 1, Table of Contents\1. Documentary Evidence\A. Town of Parker Planning Commission Agenda Packets\iii. Agenda packet for Dec 14, 2017 mtg\PC Agenda Pkt 121417 (436-462) p. 24 (459)]

As stated in the Appellants' Opening Brief at pp. 11-12, "governing bodies may self-impose mandatory requirements, including on their lower bodies such as planning commissions, through their enactments in the exercise of their legislative making authority thereby limiting their, or their planning commission's, jurisdiction and discretion to approve land use decisions". See Nixon v. City & County of Denver, 343 P.3d 1051, 1054 (Colo. App. 2014); Rags Over Ark. River v. Parks & Wildlife Bd., 360 P.3d 186, 191(Colo. App. 2015); Beaver Meadows v. Bd. of Cty. Comm'rs of Larimer Cty., State of Colo., 709 P.2d 928, 936 (Colo. 1985) (governing body may self-impose limits to its discretion and the jurisdiction of itself and its lower bodies through enactments)."

The Town and the PLHA failed to point to any portion of the record that would address the issue of whether the Town's Planning Commission acted outside of the jurisdiction granted to it by the Town. The Town in this case was acting

through its Planning Commission; therefore, any act of the Town's Planning Commission in excess of its jurisdiction constitutes the Town acting outside its jurisdiction. A town may not delegate its legislative authority especially to a non-elected board like a planning commission. City & Cty. of Denver v. Denver Firefighters Local No. 858, AFL-CIO, 663 P.2d 1032, 1037 (Colo. 1983) (Municipality may not delegate its legislative authority). The Town's Planning Commission did not have the authority to depart from the mandatory guidelines established by the Town's primary governing body nor did it have the authority to modify the Town's 2004 designation of Ironstone Way as a "private drive". Nothing in the record grants such an authority.

Further, to the extent that the Town's Planning Commission made an interpretive definition of the Town Code in the exercise of the Commission's legislative powers or quasi-judicial powers, there is nothing in the record that would support a delegation of the Town's authority to make an interpretive definition of the plain language of the Code. The Town is arguing that its Planning Commission made an interpretive definition of the Town Code. Assuming arguendo that such evidence had been in the record, such a delegation would have been an abuse of discretion and an act in excess of jurisdiction because of the general rule that a legislative body may not delegate the power to make or define laws.

> **"It is a general rule of law that a legislative body may not delegate the power to make a law or define a law, but it may delegate the power to determine some fact or state of things to effectuate the purpose of the law."** People ex rel. Dunbar v. Giordano, 173 Colo. 567, 570, 481 P.2d 415, 416 (1971).

i. The conclusory findings by the Town in regard to the mandatory sidewalks and parking do not comply with the Town's Code and are not supported by the record.

The Appellants' argument in regard to the non-compliance of the proposed development with regard to sidewalks and parking are found in the Appellants' Second Amended Opening Brief at pp. 21-23.

ii. The PLHA's construction access to the project site will impact Ironstone Way.

Based on the plans in the record, including the ones cited by the PLHA and the Town in their briefs, it would be virtually impossible for the plans to be carried out without major construction traffic and construction activities taking place on Ironstone Way. For example, the construction of the parking spaces that touch and run perpendicular to Ironstone Way on the diagram shown in PLHA's Answer Brief, P. 9, will result in construction vehicles and personnel on Ironstone Way. No one can seriously suggest that construction crews will ignore the entrance to the development on Ironstone Way as an access for the development.

iii. The Town's findings of record are inadequate to uphold the approval of the development. This is why on appeal it must resort to asking the reviewing court to supply so many of the critical interpretations, findings, and resolutions of the contradictory acts by the Town.

After reading the Town's Amended Answer Brief and the PLHA's Answer Brief, ask yourself this: what is the exact interpretive definition that the Town supposedly made and where is that definition in the record? It is not there. At best, the record merely reflects that the Town's staff suggested that Ironstone Way had public uses with nothing more. Whatever the alleged interpretive definition of the Town Code is supposed to be, it is not in the record nor is the vote adopting a new definition in the Code for public streets that would transform Town-designated private drives, on private property, into public streets. Not to worry, the Town says that the reviewing court must imply the Town's interpretative definition for it. The Planning Commission did not expressly find that Ironstone Way was a public street in the record. Not to worry, the Town says that the reviewing court must imply the Town's finding for it. The Town never explained in the record how, a road that it had designated as "private drive" on the official Plat and in its staff reports, was nonetheless not a "private drive" when it came to Code Section V.1.D.4.

CONCLUSION

Admittedly, a reviewing court may imply some findings and decisions of a governing body, to a point, but at a certain point implying the governing body's findings and decisions becomes authoring the governing body's findings and decisions. Such an invitation to the judiciary, if accepted, would destroy the separation of powers, impinge on the independence of the judiciary, and result in elimination of the checks and balances so crucial to our form of government.

Respectfully submitted this 15th day of August, 2019.

Original Signature on File at

ANDERSON & HUGHES, P.C.

/s/ *M. Stuart Anderson*

M. Stuart Anderson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 15th day of August, 2019, a true and correct copy of the foregoing Appellants' Reply Town of Parker's Amended Answer Brief and the Parker Leased Housing Associates I, LLLP's Answer Brief and was served via Colorado Courts E-Filing to the following:

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