

<b>DISTRICT COURT</b> <b>ARAPAHOE COUNTY, COLORADO</b>  7325 South Potomac Street Centennial, Colorado 80112	▲ COURT USE ONLY ▲
<b>SOUTHPARK OWNERS ASSOCIATION, INC.,</b>  Plaintiff,  vs.  <b>TRIPLE J ARMORY, INC., et al.,</b>  Defendants.	
For the Plaintiff:  Max Minnig, Jr., Esq. Max Minnig, Jr. & Associates, LLC 3617 Eaton Street Denver, Colorado 80212 Telephone: 303-825-2088  For the Defendants Triple J Armory, Inc:  Colin Deihl, Esq. Nicholas M. Cassidy, Esq. Polsinelli P.C. 1401 Lawrence Street, Suite 2300 Denver, Colorado 80202 Telephone: 303-572-9300  For the Defendants Southpark Lane, LLC:  David Teselle, Esq. Burg Simpson Eldredge Hersh & Jardine P.C. 40 Inverness Drive East Englewood, Colorado 80112 Telephone: 303-792-5595	Case Number:  <b>2018 CV 32126</b>  Division <b>15</b>
The matter came on for hearing on September 21, 2018 before the HONORABLE FREDERICK MARTINEZ, JUDGE of the District Court, and the following FTR proceedings were had.	

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I N D E X

WITNESSES FOR THE PLAINTIFF:

CHANNING O'DELL

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WITNESSES FOR THE DEFENDANTS:

NONE

EXHIBITS

IDENTIFIED

ADMITTED

For the Plaintiff:

2 p.1, 3, 10, 13, 14, 15, 17, 18, 20, 23, 30-32, 34-37		
(Stipulated exhibits) .....	46	Stip

For the Defendants:

A - Letter (Stipulated exhibit) .....	15	Stip
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**Restraining Order and Preliminary Injunction Hearing**

**September 21, 2018**

THE COURT: Let's go on the record regarding Southpark Home Owners Association versus Triple J Armory and Parklane Business Park, 18 CV 32126. May have entry of appearance on behalf of the Plaintiffs, please?

MR. MINNIG: Your Honor, Max Mr. Minnig, Jr., 16970 on behalf of Southpark Owners Association. Here at the table with me is Channing O'Dell of Custom Management Group who is the agent of the organization and two of the board members -- or three of the board members are here to (indiscernible) back with me.

THE COURT: It's only necessary as to who's here at Counsel's table.

MR. MINNIG: Yes. Thank you.

THE COURT: On behalf of the Defense, please?

MR. DEIHL: Your Honor, Collin Deihl of Polsinelli on behalf of the Defendant. With me at Counsel table is Nick Cassidy.

THE COURT: Good morning. And do we also have someone else?

MR. TESELLE: Your Honor, David Teselle from Burg Simpson Eldredge Hersh & Jardine, 29648, here on behalf of Southpark Lane, LLC.

1           THE COURT: Thank you. The matter comes on today  
2 based on the motion for a preliminary injunction that was at  
3 least acted on by me. I received a copy of the response, I  
4 believe, yesterday in opposition for the forthwith motion. And  
5 I've also had a chance to review and re-review not only the  
6 complaint but the -- some of the underlying documents  
7 associated with it. Although that is not necessarily evidence  
8 at this point, it's for the parties to present some of that  
9 evidence.

10           For preliminary matters, I know that there are a  
11 number of folks who are here and who are present but is either  
12 side requesting a sequestration order, for Plaintiff?

13           MR. MINNIG: No, Your Honor.

14           THE COURT: For Defense?

15           MR. DEIHL: We're not, Your Honor.

16           THE COURT: And who do we have behind you, sir?

17           MR. DEIHL: Your Honor, behind me are the principals  
18 of Triple J Armory, Dennis Murphree and JD.

19           THE COURT: Wonderful. Your clients?

20           MR. DEIHL: Yes.

21           THE COURT: And in terms of the issue that was raised  
22 by the Defense regarding the issuance of security pursuant to  
23 Rule 65, what does the Plaintiff say in response to that?

24           MR. MINNIG: The issue of security meaning bond, Your  
25 Honor?

1 THE COURT: Yes.

2 MR. MINNIG: Well, we would like to argue the -- the  
3 necessity of the bond and the amount of the bond, if the order  
4 is entered.

5 THE COURT: So you're saying after I make a decision  
6 this morning?

7 MR. MINNIG: Yes, Your Honor.

8 THE COURT: Okay. And in terms of the testimony,  
9 let's find out how we're going to proceed regarding what you  
10 propose the testimony to be because I've allotted two hours for  
11 this. How many witnesses does the Plaintiff intend on calling?

12 MR. MINNIG: Your Honor, at this point, we intend to  
13 call Mr. Odell. We may -- we intend to call Mr.  
14 (indiscernible) for a few moments and if necessary, we may call  
15 Mr. JD Murphree if necessary.

16 THE COURT: So potentially three witnesses for the  
17 Plaintiff. And for the Defense?

18 MR. DEIHL: Your Honor, we intend to call  
19 JD Murphree.

20 THE COURT: One -- one person?

21 MR. DEIHL: Yes, Your Honor.

22 THE COURT: Wonderful.

23 MR. MINNIG: Your Honor, and if necessary rebuttal if  
24 -- if there's testimony concerning oral statements made by Mr.  
25 (indiscernible), we would intend to bring him back on if

1 there's any time left.

2 THE COURT: Well, you each have an hour to present  
3 your case, whether it be through direct or cross-examination.  
4 Does the Plaintiff wish to make an opening statement?

5 MR. MINNIG: Yes, Your Honor. Very short. Do I need  
6 to go to the podium, Your Honor, or do -- just to do it from --  
7 from here?

8 THE COURT: The lectern.

9 MR. MINNIG: The lectern. Thank you.

10 Your Honor, this is simply an enforcement of our  
11 contract that the covenant as recorded and applicable to all  
12 properties in Southpark. Southpark is a business park. I'm  
13 not sure if the Court's familiar with Southpark. It's  
14 basically between Mineral and County Line and Santa Fe and  
15 Broadway. And it is a business park, although it does have a  
16 small residential element. It has schools and churches and  
17 other things. And it is an assessed based membership  
18 organization run by its board of directors. And it has a  
19 substantial website that puts out several documents as how the  
20 organization is run, what is required if you want to do a  
21 development in the park.

22 We are pro business and we encourage development, but  
23 we do also have significant architectural control and we have  
24 an architectural development committee that is -- consists of  
25 two of board members and four engineers. And these engineers

1 are paid engineers and we need to have those engineers paid to  
2 do the work. And so that's why part of our process is the  
3 payment of dues.

4 We were approached back in 2015 by Triple J Armory in  
5 order to do a development. They went through the process, were  
6 fully aware of the submittal and approval processes necessary.  
7 They were looking for a letter that would state that they were  
8 permitted to be in the park and we believe that he was probably  
9 looking for a letter that did more which was commit us to the  
10 development without having to go through any further process.

11 We did give him a letter that allowed for the fact  
12 that the gun store and gun range would be in fact a permitted  
13 use under our documents. And that's never been an argument.

14 THE COURT: I'm sorry, and that has never what?

15 MR. MINNIG: Never been an issue.

16 THE COURT: I thought that was exactly the issue  
17 today?

18 MR. MINNIG: No. The issue is is that once -- the --  
19 the permitted use -- and this is similar to what the -- how the  
20 city works as well and it becomes an issue in this because of  
21 the permitting process by the city. But no, Your Honor. In  
22 the first instance, you have to determine whether or not the  
23 use that you want to put to a -- a change in use of a building  
24 is permitted. And then once it is permitted, if there's a  
25 change in use, you then have to go through the submittal and

1 approval process.

2           This hearing today is they are -- it's our position  
3 that they have tried to go through without doing the submittal  
4 and approval process as dictated by the recorded documents and  
5 is reported in the clerk of reporter's office of the Arapahoe  
6 County and the property is subject to and trying to bypass  
7 that. Is the -- this is not an organization like the city that  
8 once you have your zoning, you have to simply meet the building  
9 codes and you're in. We are an organization that does have  
10 some discretionary abilities. But moreover, we have  
11 significant requirements concerning the actual building of the  
12 properties. It's an architectural control committee. It's a  
13 covenanted community and not unlike any HOA that the Court may  
14 be familiar with.

15           And we have -- a form we have to have. We have a  
16 signature you have to sign on and say you're not going to sue  
17 us over this, which has now become an issue, as the Court is  
18 aware. And it also says you have to pay your fees because  
19 these are -- these engineers have to be paid. We're not a -- a  
20 business that's carousing income. We're an assessed  
21 organization with limited funds and so our experts must be paid  
22 out of the fees that we collect from the -- the parties that  
23 want to do the change of use and/or there's also the -- if it's  
24 not a change of use, there's changes that -- that could affect  
25 the exterior of the building that are also subject to our



1 architectural control. That's the main basis of what the  
2 lawsuits about, Your Honor.

3           We have not received a proper -- the evidence will be  
4 overwhelming that we -- we have our -- our -- what our  
5 requirements are for a submittal. We have not had a submittal.  
6 We have argued that we need the submittal. We have been  
7 telling Triple J Armory repeatedly for months that they have to  
8 do a submittal and approval and they keep trying to argue that  
9 there is, in fact, a -- a -- a letter that is a get out of jail  
10 free card or something that allows them to go forward and build  
11 the building without any review whatsoever. And it --  
12 regardless of whether that -- we believe the change of use  
13 alone requires the submittal and approval. But they are  
14 clearly going to be affecting the exterior of the building in a  
15 significant manner. Note mostly -- namely the parking issues  
16 because parking is a dramatically important issue to Southpark.  
17 We have no on-street parking allowed. So every property has to  
18 be able to park all of its uses.

19           In the initially meeting --

20           THE COURT: Well, let -- let me understand that I --  
21 what you're saying.

22           MR. MINNIG: Okay.

23           THE COURT: You said that the building is actually  
24 going to change and then you segued quickly to the parking  
25 issue.

1 MR. MINNIG: Right.

2 THE COURT: Is the building -- the exterior of the  
3 building going to change?

4 MR. MINNIG: Well, there are going to be some  
5 requirements. There's going to be building -- there's going to  
6 be some exhaust buildings put on -- machinery put on the top of  
7 the building that's going to have to be screened. But the  
8 parking is the change of use --

9 THE COURT: Well, don't segue to fast.

10 MR. MINNIG: Okay.

11 THE COURT: This isn't -- this isn't the U.S. Senate.

12 MR. MINNIG: I'm sorry.

13 THE COURT: I like to stay on one topic and flush  
14 that out.

15 MR. MINNIG: Okay. Certainly, Your Honor.

16 THE COURT: Because when you say the building is  
17 going to change, you're talking about a structure on top of the  
18 building such as venting.

19 MR. MINNIG: Right. Right.

20 THE COURT: Okay. And then you segued to the parking  
21 issue, which is not the building but it's a parking issue.

22 MR. MINNIG: Right. It's -- but it's dictated by the  
23 change of use.

24 THE COURT: Okay. Just continue. I was just trying  
25 to follow your argument.

1           MR. MINNIG: Okay. The change -- the change of use  
2 -- when the initial discussion was being had with certain board  
3 members and Mr. O'Dell, it was being presented that there was  
4 going to be a change of use from what is a medical office  
5 building to a gun retail shop. So that's the change of use  
6 right there. But also, there was also going to be a change of  
7 use to include a gun range. And at the time, the discussions  
8 were originally that there was going to be a -- a one or two  
9 lanes -- and I'm not sure if there's a better term for it --  
10 but one or two lanes of shooting range to allow for people to  
11 test out their guns before they buy them. It was supposed to  
12 be in connection with the purchase of guns.

13           Then at some point in time later on while all these  
14 back and forths were going on, it became an issue that they  
15 wanted to put 21 lanes in there and create some sort of  
16 gunarama (phonetic) recreational center so that it would be,  
17 you know, significant new parking required, significant traffic  
18 lane -- traffic considerations, all the various issues that  
19 would come with something changing from the parking and the  
20 requirements of an office building to that of a gun retail  
21 store plus a 21-lane shooting range.

22           And at that point, you know, we don't believe that we  
23 ever waived any of our requirements under our written  
24 contracts. But at that point, it became clear that we did have  
25 a significant change of use and it was going to be affecting

1 the exterior of the building. And in fact we -- we -- we  
2 stated in letters and other places and in our documents that  
3 those are the -- those changes to the exterior which the Court  
4 is taking to be a physical -- apparently a physical change, the  
5 effects on the exterior of the building also are part and  
6 parcel of what's required for a change of use and/or exterior  
7 change to the building.

8 We have been -- we have asked for these submittals.  
9 At times, Triple J Armory has said okay, we -- we have to do a  
10 change of use and then gave us inadequate documents, refused to  
11 sign the application form, refused to put forward the fee. And  
12 as the Court knows in instances where there's a fee required,  
13 if you don't pay the fee, it's almost as if you don't exist.  
14 And that's what's happening here. We -- we simply do not go  
15 forward without giving our approval. And, Your Honor, to make  
16 sure that I'm not skipping the point. When we get the  
17 submittal, there's three possible outcomes. There's an  
18 approval -- there's a conditional approval which simply says  
19 okay what you're doing can be done. But with the way you've  
20 put it forward, you need to think about changing A, B, C, D --  
21 whatever it is. And we will then review again and -- and --  
22 and then there's, of course a -- a denial. And we have the  
23 right of denial.

24 But there's never -- in this instance, Your Honor, we  
25 have never done a review of their materials because there's

1 never been a proper submittal. And the only issue as far as  
2 Triple J Armory is concerned here today is we are asking the  
3 Court to enjoin the construction. Now, they have gotten their  
4 permit from the city, although they did start construction  
5 before they got the permit and had to be red tagged by the city  
6 to stop the construction until they got their permit. And when  
7 asked about it the response was well, we took a calculated  
8 risk. That's kind of what we feel like's going on here, Your  
9 Honor. It's like we -- we are kids. You're -- they would  
10 rather ask forgiveness than permission.

11 THE COURT: Well, Counsel, this is now closing  
12 argument.

13 MR. MINNIG: Okay. I'm sorry, Your Honor.

14 THE COURT: But I'll -- I'll remind you that you have  
15 one hour. You said brief, and I hope that all the testimony  
16 that you've talked is going to come through the witness, not  
17 through Counsel.

18 MR. MINNIG: Thank you. Okay, Your Honor. Thank  
19 you. I -- I just -- so the issue before the Court is simply,  
20 as far as Triple J Armory goes, we're simply asking the Court  
21 to find that they have to cease and assist. They have to not  
22 continue any further construction until they do a proper  
23 submittal and get their approval from us. There's a secondary  
24 issue as to the -- as to the two properties that are related  
25 here. And that is that we ask also for the Court to make

1 finding that they must get the -- the approval of the other  
2 property that's associated with their property which is called  
3 in -- in a reciprocal easement agreement which is a recorded  
4 covenant agreement that says the two properties are being  
5 treated by one as -- as far as just Southpark Owner Association  
6 is concerned that we have to have that approval as a part of  
7 our submittal package. That's the -- that -- and that's a --  
8 the secondary issue in this thing.

9 THE COURT: Thank you.

10 MR. MINNIG: Thank you, Your Honor.

11 THE COURT: And let me just ask the parties just  
12 generally before -- are there any stipulations regarding any  
13 exhibits to be tendered to the Court? Specifically, the  
14 Channing O'Dell letter, 10/26/2017?

15 MR. MINNIG: Your Honor, that's -- that's in evidence  
16 as far as we're concerned.

17 MR. DEIHL: We'd stipulate to it.

18 THE COURT: Well, I don't have the evidence --

19 MR. DEIHL: -- to it's admission and I have a copy,  
20 Your Honor.

21 THE COURT: Let's bring it up.

22 MR. MINNIG: And it's -- it's in my notebook as well,  
23 Your Honor. But let me give you those numbers.

24 THE COURT: Let me -- let me -- let me tell, Counsel,  
25 what's in your notebook is fine. Until I have it, it has no

1 significance to me.

2 MR. DEIHL: May I approach, Your Honor?

3 THE COURT: Please. Thank you. And what I'm  
4 tendered by the Defense --

5 MR. MINNIG: If I may approach, Your Honor?

6 THE COURT: Yes. What I'm tendered by the Defendant  
7 is a letter allegedly by Channing Southpark Owners Association  
8 dated October 26th, 2017. And there's a stipulation that it  
9 should be admitted?

10 MR. MINNIG: And those are simply our exhibits.

11 THE COURT: Is there a stipulation that this letter  
12 shall be admitted?

13 MR. MINNIG: Yes, Your Honor.

14 THE COURT: And for the Defense, your argument or  
15 your opening statement.

16 MR. DEIHL: Your Honor, would you like me to mark the  
17 exhibit as Exhibit A for purposes of the record?

18 THE COURT: Let's just continue with your --

19 MR. DEIHL: Okay.

20 THE COURT: -- opening statement.

21 MR. DEIHL: Your Honor, it sounds like you've had an  
22 opportunity to read the submissions and counterclaim and  
23 response so I'm not going to repeat that here. The SPOA's  
24 request in its motion for preliminary injunction seems simple  
25 on its face, although what Counsel said in opening is different

1 from what it asked in its papers. In its papers, it asked for  
2 an injunction until we submit a change of use and this morning,  
3 it's asking apparently for an injunction until my client  
4 conducts no further construction.

5 But, Your Honor, that ship has already sailed. As  
6 you can see from the exhibit that was just tendered to the  
7 Court, the Channing O'Dell letter. Back in -- last fall,  
8 almost a year ago, SPOA approved this use as gun store and a  
9 gun range. There were conversations between my client and SPOA  
10 regarding that gun range. And in its letter of approval, SPOA  
11 told Triple J in writing that this was an approved use at this  
12 particular location. It told Triple J that all Triple J needed  
13 to do was submit architectural review applications if it  
14 changed the exterior of the building. And that's exactly what  
15 Triple J has done. In reliance on that letter and in reliance  
16 on conversations with the Association, Triple J entered into a  
17 ten-year lease for this building and is on the hook to pay  
18 rental payments for ten years along with a personal guarantee  
19 from my clients.

20 In addition, Triple J began renovating the building  
21 based on a building permit issued by the City of Littleton,  
22 took out construction loans and met with SPOA on multiple  
23 occasions between October and May of this year. Before Triple  
24 J signed the loan, they called again the SPOA and asked is --  
25 is -- has anything changed, can we proceed with this use and



1 were told they could. In May, they met with SPOA and had a  
2 conversation about the parking issue that Mr. Minnig mentioned  
3 in his opening. And they reached a resolution on parking and  
4 were told they had sufficient parking.

5           Then all of the sudden in the summer of this year,  
6 SPOA reneged. It changed its mind. We believe likely because  
7 there was an anonymous flyer distributed to the surrounding  
8 community. And Triple -- and SPOA then told Triple J that it  
9 needed to submit an application for its change of use and for  
10 construction. And Triple J sent in in good faith and trying to  
11 be a proper neighborhood member sent in all of its construction  
12 plans to SPOA and it sent in a letter that contained a change  
13 of use. The only thing Triple J didn't do was sign a form that  
14 was provided by the Association that reported to waive all  
15 legal claims against SPOA and Triple J knew at that time that  
16 this was going down a bad road and couldn't waive all of its  
17 legal claims.

18           What did SPOA do once it received the packet of  
19 information from Triple J, it sent us a cease and assist order  
20 and told us to stop all construction and to stop any use of the  
21 property. It then filed this lawsuit in county court first and  
22 then dismissed the lawsuit in county court and filed the  
23 lawsuit here.

24           Based on those facts which the testimony of JD will  
25 support, we believe there's no likelihood of success on the

1 merits for SPOA's claims here. Triple J's use was approved  
2 over a year ago. Triple J relied on that approval and the  
3 status quo today, Your Honor, is that we have constructed  
4 interior changes to a building at great cost based on approval  
5 of use and that's the status quo that they are asking you to  
6 change if you issue an injunction here today.

7           We also don't think there's any irreparable harm to  
8 the Association if you -- if you don't issue an injunction. If  
9 it turns out that Triple J is wrong, SPOA has multiple remedies  
10 available. It can enforce its noise requirements. It can  
11 enforce the covenants that exist in the community. It has the  
12 ability to fine us if -- if we violate its covenants going  
13 forward. If it wins the lawsuit going forward, it can order us  
14 to stop operating and can collect damages from us. This isn't  
15 a case of a wrecking ball, Your Honor. This isn't a case where  
16 there's a building about to be taken down. In fact, it's just  
17 the opposite. This is a case where my clients have invested  
18 significant amounts of money in a new business at the  
19 encouragement and support of the Association and now the  
20 Association is trying to stop them from operating and trying to  
21 delay this in order to prevent them from proceeding with their  
22 business.

23           It's also not in the public interest, Your Honor.  
24 This building is sitting empty with no business going on. This  
25 is a business park and the public doesn't have the benefit of

1 being able to use my client's retail store.

2           Finally, Your Honor, we believe a speedy remedy is  
3 available. The Declaratory Judgment Act specifically provides  
4 that you're entitled to a speedy hearing on a declaratory  
5 judgment and both parties essentially have asked for that. And  
6 the balance of equities favors Triple J. Again, we relied on  
7 the promises that were made by SPOA. SPOA knew what Triple J  
8 was doing and SPOA simply changed its mind. Based on that,  
9 Your Honor, we would ask the Court to deny the preliminary  
10 injunction. Thank you.

11           THE COURT: Would the Plaintiff like to call your  
12 first witness?

13           MR. MINNIG: Yes, Your Honor. First, I'd like to  
14 supply the Defense with two copies of the exhibits. I would  
15 like to call Channing Mr. O'Dell to the stand.

16           THE COURT: Thank you. Mr. O'Dell, if you'd approach  
17 the witness stand. And if you'd raise your right hand.

18           Sir, do you solemnly swear or affirm that the  
19 testimony you are about to give will be the truth and nothing  
20 but the truth?

21           MR. O'DELL: I do.

22           **CHANNING O'DELL, PLAINTIFF'S WITNESS, SWORN**

23           THE COURT: Please, have a seat.

24           MR. MINNIG: Your Honor, if I may approach just to  
25 give the exhibit book?

1 THE COURT: Yes. And if you would, sir, state your  
2 name and spell your last name for the record?

3 THE WITNESS: My name is Channing O'Dell. Last name  
4 is O-D-E-L-L.

5 THE COURT: Counsel's going to ask questions. Please  
6 wait until the question is fully asked before you begin your  
7 response. If there's an objection or I am speaking, please  
8 pause and I'll give you further instruction.

9 Counsel, when you're ready.

10 **DIRECT EXAMINATION**

11 BY MR. MINNIG:

12 Q Mr. O'Dell, could you please tell the Court what your  
13 position is in relationship to Southpark Owners Association?

14 A I work for Custom Management Group and Custom  
15 Management Group was hired by the Southpark Owners Association  
16 for management of the park. And I'm the manager with Custom  
17 Management Group.

18 Q Okay. Mr. O'Dell, are you familiar with Triple J  
19 Armory?

20 A Yes, I am.

21 Q And how are you familiar with Triple J Armory?

22 A Well, I first became familiar with them when they  
23 made a -- what we call a preliminary submittal to the Southpark  
24 Owners Association. They were interested in building a gun  
25 store at a vacant lot that was for sale in what is known at the

1 Hilltop area of Southpark.

2 Q And if you would look at Exhibit 1. What is Exhibit  
3 1?

4 A Exhibit 1 is a letter that was sent from the  
5 Southpark architectural development control committee to Triple  
6 J Armory regarding their conceptual review, their pre-submittal  
7 for a -- a building that would be a gun store at Southpark.

8 Q And was -- does this letter discuss the submittal and  
9 approval process?

10 A It does. It outlines what somebody would have to do  
11 if they continued on. If I can, I'll describe a little bit  
12 about what a conceptual review is. People come to Southpark  
13 from time to time. They want to develop a building or have  
14 some type of a business. They're not sure whether their --  
15 either their design or their business will fly.

16 So they'll ask to meet with Southpark architectural  
17 development control committee to discuss some of their  
18 preliminary designs or requests. And we usually do those types  
19 of things with a -- a lesser fee involved. And then they will  
20 come and present their -- whatever they have to the  
21 architectural development control committee and we will give  
22 them some feedback as to the likelihood of the building meeting  
23 the architectural development guidelines, et cetera.

24 Q And let's get into the issue of -- well, let me back  
25 up. So Triple J Armory was familiar with the submittal and

1 approval process before this next go around started with the  
2 property at issue?

3 A Well, they'd been through a portion of it before,  
4 yes. We had a meeting on the date of -- this looks like it was  
5 3/25/15. They were the only people at that ADCC meeting. It  
6 was called for that purpose. So they'd been through -- through  
7 this before.

8 Q Okay. If you -- if you would, would you take a look  
9 at Exhibit 2, please? And what is that document?

10 A This is an email from Custom Management Group to the  
11 board of directors, at least to -- to Mike here. And it's  
12 regarding Triple J's request for a -- whether a gun store or  
13 gun range would be an approved use within the Southpark Owners  
14 Association.

15 Q And why don't you explain what -- what it means to  
16 get a statement of approved use? What does -- what does that  
17 mean?

18 A Well, within the Southpark governing documents,  
19 there's permitted uses within Southpark that are specifically  
20 listed as what those are. And it doesn't list every possible  
21 potential use that there could be in the park. So sometimes  
22 people will come and they'll ask us if this -- their particular  
23 business would fall within a category of that permitted usage.  
24 And so we look at that and see if that yes, would be a  
25 permitted use within what is allowed in Southpark.

1           Q     So what happens -- so by concluding that it is a  
2 permitted use, what's the next step?

3           A     Well, if it is a permitted use, then if the applicant  
4 or whoever wants to do that particular use, wants to be in  
5 Southpark depending on what they have to do, they make a  
6 submittal to the Southpark Owners Association and part of that  
7 is -- and what we've seen more lately is as the park has  
8 matured as they'll be people coming into the park who want to  
9 have a business in an existing structure. It is not in that  
10 structure now.

11           So if there is a change of use to that particular building  
12 or facility from what it was previously, then there's a change  
13 of use that has to go before the Southpark Owners Association  
14 before the development control committee and they'll review  
15 that change (indiscernible) applicability to that particular  
16 building or site.

17           Q     In -- where -- if someone wanted to do the process  
18 that -- that Triple J Armory is -- is trying to do, where would  
19 they find the information that they needed?

20           A     Well, they -- we have a website, Southpark does, that  
21 lists the development guidelines. It lists the governing  
22 documents for the Association. So they can go on there. They  
23 can request a meeting with the architectural development  
24 control committee. They could ask that committee those  
25 questions. Typically, that doesn't happen. Most people will

1 review the development guidelines and they'll review the  
2 governing documents and they'll prepare a submittal based upon  
3 what the requirements might be.

4 Q And what are the requirements for someone who wants  
5 to go through the submittal and application process?

6 A Well, first off, we have -- Southpark has developed a  
7 review fee acknowledgement form that sets forth certain  
8 specific things in that form. That's to be signed by the --  
9 the building owner or the owner's agent. There's a fee that is  
10 paid to Southpark for the service of rendering that review.  
11 Southpark architectural development control committee is made  
12 up of -- it's a seven member committee. Four of the members on  
13 that committee are paid consultants to the board. There is a  
14 -- a civil engineer. There's a landscape architect and there  
15 are two architects that make up those four. And the remaining  
16 members are volunteers who are members of Southpark.

17 Q And was that fee ever received by Southpark in  
18 connection with this project?

19 A It was not received from Triple J in -- regarding to  
20 this project, no.

21 Q Okay.

22 A We did not receive the fee or the form.

23 Q Okay. Besides the fee, what else is required?

24 A Well, you would have to submit the form and then you  
25 would submit to Custom Management Group as agent for Southpark.



1 We kind of act as the secretary and bring those submittals  
2 together. You're required to have two hardcopies and as things  
3 have become more electronic, we ask for an electronic copy of a  
4 submission to Southpark. Once we have the review fee form, the  
5 fee, the required number of submittal packages, that is  
6 forwarded to the architectural development control committee  
7 for review.

8 Q Okay. Would you look at Exhibit 34, please? Okay.  
9 What is this document?

10 A This looks like a -- kind of a screenshot of the  
11 Southpark Owners Association website that lists various things  
12 on there under the frequently asked questions section.

13 Q If you would look at that -- and first of all would  
14 you look at interior there. Do you see that?

15 A At the bottom I do, yes.

16 Q Yes. And what -- what does that say about interior?

17 A It's a form of a question and it says does the  
18 Southpark Owners Association require approval for alteration or  
19 improvements to the interior of the building.

20 Q And the answer is?

21 A The answer is -- and it's provided on the website as  
22 well, it says unless the interior modifications were alerted  
23 the, the exterior, i.e., creating a new entrance door or adding  
24 windows as part of an interior remodel, no submittal or  
25 approval is required by the Southpark Owners Association.

1           Q     So then let's go to the next question.  What does  
2 that state?

3           A     "Does the Southpark Owners Association require  
4 approval regarding changing the use of an existing building or  
5 the building site?"

6           Q     And the answer to that is?

7           A     It reads, "The Southpark Owners Association has  
8 certain permitted uses," that's in quotes, "as outlined in the  
9 governing documents.  If you're building or site is approved  
10 for certain type of use and you desire to change that use,  
11 i.e., office to retail, retail to medical, retail to warehouse  
12 distribution, approval is required by the Southpark Owners  
13 Association."

14          Q     And the use of the building prior to Triple J Armory  
15 was what?

16          A     Our understanding, it's an office warehouse complex.

17          Q     And what was the use going to be after that?

18          A     The proposed use from the Triple J is a -- a gun --  
19 retail gun store and gun range.

20          Q     And did you -- did you participate in the oral  
21 discussions about the gun site -- I mean the gun retail store  
22 and the shooting range prior to the exchange of documents or  
23 your letters or anything like that?

24          A     Are you talking about with Triple J?

25          Q     Yes.

1           A     Yes, we had some informal meetings with Triple J.

2           Q     And did you have an understanding what they were  
3 doing at that point in time?

4           A     They had inquired as to whether a gun store or a gun  
5 range would be a permitted use within Southpark.

6           Q     Did they talk about the extent of the gun range or  
7 the extent of the gun sales store?

8           A     Not at that time. This was just a preliminary talk  
9 with Triple J. Triple J was -- they weren't an owner in the  
10 park, they weren't a tenant in the park. They were just making  
11 an inquiry about permitted uses.

12          Q     Now let's talk about that for a second. When you say  
13 they're not an owner in the park, why is that relevant?

14          A     Well, the owners -- a building owner -- building site  
15 owner would be the one that would be subject to the governing  
16 documents. Somebody who's not in the park wouldn't be subject  
17 to those documents. And we do have people from time to time  
18 that contact Southpark and they want to know if they can put a  
19 certain building or use in there and they're on the outside.  
20 They haven't decided to purchase yet or anything.

21               One of the most recents was we've had several inquiries  
22 about residential development within Southpark. And these  
23 people will ask to meet with me or a board member or a couple  
24 of board members informally. Sometimes even meet with the ADCC  
25 and are willing to pay the fee just to see what the read is

1 from Southpark as to their proposed development.

2 Q Would you look at Exhibit 31, please?

3 A Okay.

4 Q What is Exhibit 31?

5 A Exhibit 31 is the development guidelines for the  
6 Southpark Owners Association.

7 Q And this one references Southpark the plaza, the  
8 campus, the hilltop business center. What -- what does that  
9 mean?

10 A Well, when the park was originally developed, they  
11 had it in several different areas. They had several different  
12 names for it. The plaza area that is referenced there is more  
13 or less a retail operation along Broadway in between Mineral  
14 and County Line Road. As you move west from that, they have  
15 the area of what they call -- they called it the campus area  
16 and it was not retail. It was office warehouse. It was  
17 perhaps light manufacturing. There were -- and there was a  
18 school that went in there. There's some public storage spaces  
19 that were constructed in that area.

20 Ultimately, there were two residential developments that  
21 were replaced in -- in that area and the Hilltop business  
22 center was one that came around a little bit later. It was an  
23 annexation of land that's down by County Line and Santa Fe.

24 Q If you would turn to page -- first of all, where is  
25 this document available?

1           A     Well, the document is available on the -- the website  
2 and it's available at our office.

3           Q     Okay. And would you turn to page eight, please?

4           A     Of Exhibit 31?

5           Q     Yes, sir.

6           A     Okay.

7           Q     And what is that?

8           A     This page is titled, "Design review and approval  
9 procedures required information."

10          Q     And as we look through here, it -- it -- you -- it  
11 goes on and has a list of required information. Do you -- do  
12 you see that?

13          A     Yes, I do.

14          Q     And it's -- it seems fairly detailed; is that  
15 correct?

16          A     Yes, it is.

17          Q     And did you get this type of information from Triple  
18 J concerning their project?

19          A     Well, we didn't get this detail of information. The  
20 only thing that we got from Triple J that even remotely  
21 addressed some of this was a -- a submittal that they termed  
22 was not a submittal but a courtesy to Southpark that had some  
23 of -- some site information, the size of the building and  
24 different things like that.

25          Q     Well, and in this -- in this design requirements, the

1 -- the requirements you were talking about, the application,  
2 the signed application, the payment of the fee, and the  
3 information is required herein, did you ever receive any of  
4 that from Triple J?

5 A We did not, no.

6 Q And -- and -- when you get asked about this -- these  
7 requirements, do you generally respond to those requests?

8 A Yes.

9 Q Do you put out explanatory letters and that type of  
10 thing usually?

11 A Well, typically not. We don't presume to know what  
12 people want to do with their -- with their building sites so  
13 we'll refer them to the -- the governing documents for these  
14 development guidelines for review. They'll be times when the  
15 applicant is sufficiently -- is -- is a developer and they know  
16 about these types of things and they're able to make a  
17 submittal or they may hire a consultant or an architect to help  
18 them. But I did respond in this case to Triple J to -- in one  
19 letter to provide them with some additional information that I  
20 thought would be helpful for their submittal.

21 Q Okay. And just to make sure we're clear on this. At  
22 any time, did you receive a submittal that was in conformance  
23 with our requirements under the recorded documents?

24 A No.

25 Q Okay. Would you take a look at Exhibit 3, please?

1 Exhibit D --

2 A Exhibit 3?

3 Q Yeah, Exhibit 3. Excuse me.

4 A Uh-huh.

5 Q This is a -- the -- the first part of it is another  
6 copy of a letter that's been handed to the Court that's been  
7 stipulated to by the parties. Do you recognize this letter?

8 A Yes, I do.

9 Q And why don't you tell the Court what it was that you  
10 were doing with this letter?

11 A Okay. This is an email that was sent to JD at Triple  
12 J. They had requested that the Southpark board of directors  
13 review or approve the use of a gun store as a permitted use  
14 within Southpark. So this response to JD was stating that the  
15 Southpark board of directors had approved a gun store as a  
16 permitted use within Southpark.

17 THE COURT: Only a gun store?

18 THE WITNESS: And a gun range.

19 Q (By Mr. Minnig) Okay. And at this point, were you  
20 in any intent to waive the requirements of Southpark Owners  
21 Association concerning submittal plans and other documents as  
22 required at we just discussed?

23 A No. As I had stated before, Triple J was a -- they  
24 weren't an owner or a -- a tenant or anything in Southpark. We  
25 were providing this really as a courtesy --

1           THE COURT: Sir, I'm having some difficulty hearing  
2 you. That microphone is not going to break. But it sounds  
3 like you either have a cold or that you're soft spoken, so.

4           THE WITNESS: I'm a little soft spoken, yeah.

5           THE COURT: When then I need to hear what you're  
6 saying. So have him repeat the last answer, please.

7           THE WITNESS: Yeah. What we had done was we had --  
8 Southpark board of directors had reviewed this as a courtesy  
9 for Triple J. Triple J was not an owner or a tenant, but they  
10 wanted to board's input so the board had reviewed the -- a gun  
11 store or a gun range as a permitted use within Southpark.

12          Q     (By Mr. Minnig) Now, there was some back and forth  
13 going on between you and JD concerning -- what -- what was the  
14 nature of the back and forth between you concerning this going  
15 forward?

16          A     Well, we really didn't have much back and forth until  
17 some period of time later. After this email to JD, we didn't  
18 hear anything for months -- I don't know -- four or five  
19 months. So we just presumed that this had just died and wasn't  
20 -- nobody was moving forward with the project. And that  
21 happens from time to time and people will just -- they'll get  
22 some information that they needed and then they, for whatever  
23 reasons, they determine that they don't want to move forward.  
24 So I had no back and forth with them until some time later  
25 early in March or April of 2018.



1 Q Okay. Would you take a look at Exhibit D, please?

2 A Exhibit D?

3 Q Exhibit 10. I apologize.

4 A Okay.

5 Q And what is Exhibit 10?

6 A Exhibit 10 is a letter that was from the Southpark  
7 Owners Association to the owner of 8152 Southpark Lane. That's  
8 the building that Triple J Armory wanted to locate in.

9 Q And you addressed this letter to whom?

10 A This went to the owner which is the -- Mr. and Mrs.  
11 (indiscernible).

12 Q And what was the intent of this letter?

13 A Well, this was to clarify the position of the  
14 Southpark Owners Association regarding the change in use that  
15 was proposed for 8152 from office warehouse to a retail gun  
16 store and shooting range.

17 Q And do you see paragraph three?

18 A Yes.

19 Q And that -- that references the change of use?

20 A It does.

21 Q And does it in fact tell them that they need to  
22 follow the requirements of SPOA and what the submittals were  
23 and et cetera?

24 A It does. The first paragraph -- there was a sentence  
25 in that paragraph that said "A change in use requires a written

1   submittal from the property owner not the prospective tenant.  
2   Please describe the existing use and the proposed use to the  
3   SPOA to include building square footage currently allocated to  
4   office warehouse and the pro square footage for gun store and  
5   gun range. The SPOA will respond in the timely manner."

6           Q     Okay. Would you check -- go -- look at Exhibit 11,  
7   please?

8           A     All right.

9           Q     Do -- do you recognize these emails?

10          A     I do.

11          Q     This was between SPOA and the city. Now, the city  
12   took a -- do you know what the city was -- the position that  
13   the city was taking and communicated to Triple J concerning the  
14   necessity of having a submittal and approval process by SPOA?

15          A     Yes. They had -- it was part of their -- their  
16   statements that they had to -- that they had to -- Triple J had  
17   to have approval of the Southpark Owners Association for their  
18   proposed use.

19          Q     Well, would you say proposed use, do you mean --

20          A     As a gun store gun. And changing the use from an  
21   office warehouse to a gun store gun range.

22          Q     Well, are -- are you at this point talking about the  
23   simple statement that it was a permitted use in the park or are  
24   you talking about the submittal and approval process?

25          A     Well, you're talking about two different things.

1 There is a permitted use and then there are a change in that  
2 use from what you had previous to something different. And  
3 those are two different things entirely. And a permitted use  
4 can be, as described, it could be exactly described in the  
5 governing documents or it could fall under one of those uses  
6 and a change of use is -- is moving from an existing use to  
7 some different use.

8 Q And was -- from -- from your understanding of the --  
9 and your communications with the city, were they requiring the  
10 change of use submittal and approval process as part of the --  
11 of what needed to be done by Triple J?

12 A Yes.

13 MR. DEIHL: Object to the question, Your Honor.

14 THE COURT: Objection -- sorry. I couldn't hear you.  
15 You'll have to stand.

16 MR. DEIHL: I'm sorry, Your Honor. Objection. Calls  
17 for hearsay. He's asking about what the city thought.

18 THE COURT: What was the response?

19 MR. MINNIG: I -- I specifically said based on the  
20 letters here in front of you and your discussions with the  
21 city, were they required.

22 THE COURT: Hearsay exception?

23 MR. MINNIG: Oh, statements of a city organization  
24 but I'll -- I'll get it out of the documents, Your Honor, to  
25 make it --

1 THE COURT: Objection sustained.

2 MR. MINNIG: -- make it straightforward.

3 Q (By Mr. Minnig) If you would, take a look at --  
4 let's just move on for right now because I have a very limited  
5 amount of time and -- would you look at Exhibit 14?

6 A Okay.

7 Q And did -- are you familiar with this letter?

8 A I am.

9 Q And this is a letter from me to the owners of the  
10 property; is that correct?

11 A It is -- it's from Custom Management Group to  
12 JD Murphree.

13 Q Uh-huh?

14 A Uh-huh.

15 Q And -- oh, no, I'm looking at the wrong -- I'm sorry.  
16 Exhibit 13. I apologize.

17 A All right. All right. Yes, this is the letter from  
18 you to the owners of the 8152 Southpark Lane.

19 Q And does this again explain that the -- we need a  
20 proper submittal and approval to go forward with the project?

21 A Yes, it does.

22 Q Okay. And then if you'd look at Exhibit 14.

23 A Okay.

24 Q And this is a letter from you to JD.

25 A It is. It's an email from me to JD.

1           Q     And this is the letter you were referring to before  
2 you explained to him that the processes that are required; is  
3 that right?

4           A     Yeah.  It's -- it's not a complete list.  That  
5 complete list could be found in the architectural development  
6 control guidelines but I tried to provide him with some  
7 additional information if they chose to move forward with the  
8 change of use submittal.

9           Q     Okay.  Then I want to take you to the next document,  
10 which is Exhibit 15.  And may I represent this is also attached  
11 to the complaint that we received yesterday.  Could you read --  
12 read that first sentence to that letter?

13          A     The first sentence says "The purpose of this letter  
14 is to request the approval of an official change of use for the  
15 following property.  This request is made to the Southpark  
16 Owners Association --

17          Q     So at this point --

18          A     -- is 152 Southpark Lane which is the subject  
19 building, Littleton."

20          Q     So at this point, Triple J is in fact seeking the  
21 approval through the change of use procedure as required by  
22 Southpark; is that a fair statement?

23          A     That's what it would appear to me to be.

24          Q     Okay.  So on our limited time, let's move on to  
25 Exhibit 17.  And do you see at the very bottom of Exhibit 17 an

1 email from David (indiscernible) to JD Murphree and copying  
2 you?

3 A Yes.

4 Q And what does that say?

5 A It says "JD, thanks for keeping me in the  
6 communication loop. Please continue to copy me on all  
7 correspondence relating to your change of use approval process  
8 with SPOA."

9 Q Now, the change of use issue is important here  
10 because the issue that the Judge was addressing in -- in the  
11 opening, we're talking about changing the interior of the  
12 building versus a change of use. If there is a change of use  
13 -- in a flow chart, if there's a change of use, what does that  
14 trigger?

15 A Well, it triggers a review of -- by the Southpark  
16 architectural development control committee and let me give you  
17 an example and maybe it's more clearly understood. If you have  
18 an office building and the person wants to -- they -- they have  
19 a new tenant and they want to remodel the office building and  
20 they're changing the interior wall configuration to better  
21 accommodate a -- a new tenant but the use is staying as an  
22 office building, there's no need to submit to the Southpark  
23 Owners Association if that remodel doesn't change the exterior  
24 of the building. If by changing that, for example, they went  
25 from a low-density office building to a high density and it

1 might require new rooftop equipment be installed on the roof,  
2 that would change the exterior of the building and they would  
3 need to make a submittal. Otherwise, they wouldn't have to.

4 On a change of use application, for example, if you have  
5 an office building and it's now going to a retail operation,  
6 that can impact the exterior of the building in a number of  
7 ways. Perhaps they are adding rooftop equipment, maybe they  
8 aren't. But a significant impact can be a parking  
9 configuration, and parking requirements for retail are  
10 different than they are for an office warehouse building. So  
11 part of what Southpark wants to do is make sure that the  
12 existing building site can park under a new change of use -- or  
13 under a different kind of configuration and the applicant has  
14 to prove up to the committee that the existing building site  
15 under a number of different circumstances can accommodate a  
16 change of use.

17 Q Okay. Quickly, would you look at Exhibit 20, please?

18 A Yes.

19 Q And what is that letter?

20 A This is a letter from you to the Parklane Business  
21 park and to RHR Investments Southpark Lane, LLC.

22 Q And why was it decided to put out a cease and assist  
23 letter at this point?

24 A Well, we were -- we had noticed or been told that  
25 there had been construction that had been started in -- in the

1 building, and I had been red tagged by the City of Littleton  
2 Building Department for it to stop. So by all measures Triple  
3 J Armory was proceeding with the proposed gun store gun range  
4 and they hadn't made a proper submittal to the Southpark Owners  
5 Association and we had this -- this Southpark had you send this  
6 cease and assist letter.

7 Q And if you would very quickly turn to Exhibit -- I  
8 believe it is 29 -- or no, 23. Excuse me.

9 A All right.

10 Q And what was the purpose of this letter?

11 A This letter's dated August 3rd. It's to David and  
12 Brenda (indiscernible) care of JD at Triple J Armory. He, at  
13 this time, had been appointed as an agent for the owner. It's  
14 addressing the letter requesting changes of use and approval  
15 dated 7/19. And it talks about a change of use request is to  
16 be submitted to the Southpark architectural control committee  
17 and that they have -- have not completed a submission for a  
18 change of use.

19 Q Okay. Would --

20 A And it further goes on to state that there is a  
21 separate -- that the 8152 building is -- that is the subject  
22 where the gun store gun range wants to go is also part of a  
23 separate set of declarations that contain -- that is -- with  
24 that building 8152 and the building next to it, 8122, those two  
25 buildings were developed as one building site within Southpark



1 and these are a set of declarations an reciprocal easements  
2 that tell those two properties how they are to cooperate with  
3 each other and that Southpark is to recognize the two as one  
4 building site.

5 And that as part of Southpark's protocol, we require that  
6 some associations of -- I'll use that term for this, although  
7 it's not specifically described in their -- in their  
8 declarations that they are that. But it's an operating  
9 agreement so we request that these types of subassociations or  
10 -- that have these different operation agreements are also --  
11 have the approval within their little association that they can  
12 go forward with it.

13 Q And then that Exhibit 37.

14 A 37?

15 Q Yes. Would you take a quick look at that? And is  
16 that the document that you're referring to as the document that  
17 creates the Parklane Business Park subassociation?

18 A Yes, it is.

19 Q That's the one that's attached to the complaint in  
20 this matter that you reviewed?

21 A Yes.

22 Q And -- and as you were saying, this requires that you  
23 -- you treat the two properties as one?

24 A It specifically states in there that the two -- two  
25 properties are to be treated as one building site.

1           Q     And we -- and Southpark has long considered its  
2 operating documents to require any subassociation to give  
3 approval of any development on the property?

4           A     Yes.

5           Q     And did you ever receive such an approval from the  
6 subassociation?

7           A     No.

8           Q     And did you require that -- did you ask the -- those  
9 two members to supply such an approval?

10          A     Yes.

11          Q     And they -- do date, nothing like that has been  
12 received; is that right?

13          A     No.

14          Q     Okay. Would you take a quick look at Exhibit 17?

15          A     All right.

16          Q     Oh, excuse me. Exhibit 18. I apologize.

17          A     Okay.

18          Q     And in -- what is Exhibit 18?

19          A     It's a letter from the City of Littleton addressed to  
20 interested parties from the City of Littleton regarding the  
21 proposed gun store office indoor range at 8152 Southpark Lane.

22          Q     And is that letter referrant to the (indiscernible)  
23 requirement of SPOA's -- Southpark Owners Association getting  
24 approval from JD -- from Triple J as part of the process?

25          A     It does, yes.

1           Q     Thank you. I want to draw your attention to -- I'm  
2 going to -- I'm going to have to end with you even though I  
3 think I have substantially for more information. But would you  
4 look at Exhibit 30, please?

5           A     Okay.

6           Q     And that's a map of Southpark; is that right?

7           A     Yes, it is.

8           Q     Showing the various sections that we're discussing  
9 here today?

10          A     Yes.

11          Q     Okay. Would you take a look at Exhibit 32, please?  
12 Is that a further statement of the submittal process as  
13 required by Southpark?

14          A     Yes, it is.

15          Q     And where's that located?

16          A     This is located on the Association's website. It's  
17 also available in our office.

18          Q     Okay. Would you take a look at Exhibit 36, please?

19          A     All right.

20          Q     And what is Exhibit 36?

21          A     It's the second amended restated declaration of  
22 covenants, conditions and restrictions of Southpark.

23          Q     Now, would you -- and is that recorded in the  
24 Arapahoe County records?

25          A     Yes, it is.

1 Q And that's -- all the properties in Southpark are  
2 subject to that?

3 A Yes, they are.

4 Q Okay. And would take a look at page 14, please? Oh,  
5 wait a minute. I'm -- I'm sorry. Exhibit -- page 17 there.

6 A Okay.

7 Q Do you see 4.6?

8 A Yes.

9 Q And what is 4.6?

10 A It's titled, "Disclaimer of Liability."

11 Q And in essence it says that no member -- Southpark  
12 nor any of its representatives would be subject to a lawsuit  
13 arising from the facts of a -- the process that we're going  
14 through here today?

15 A Yes.

16 Q And were you served with a complaint -- I mean, as  
17 far as you know, Southpark was served with a complaint  
18 concerning this very issue asking for 8 million dollars just in  
19 this last day or two?

20 A That's what I understand, yes.

21 MR. MINNIG: Your Honor, I've -- I've -- I've got  
22 several exhibits that I referenced and had him reference and I  
23 would go through those as Exhibits 1 --

24 THE COURT: Well, let me make sure I understand what  
25 you're doing. You're asking for me to do what? Because I've

1 heard that you've referenced these.

2 MR. MINNIG: I'm going to ask they be admitted right  
3 now.

4 THE COURT: And those need to be done  
5 contemporaneously. I'm going to take a break so you can find  
6 out if that -- there is an objection or not. The reason why is  
7 it may contain hearsay. It may contain 403 material. It may  
8 not be subject to any rule of evidence for its admissibility.  
9 You can't refer to what I will call 37 exhibits and then ask  
10 Counsel to say do you have any objections. They need to be  
11 done contemporaneously.

12 MR. MINNIG: I apologize.

13 THE COURT: I'm going to take a break. And I'm going  
14 to see if you can resolve any of those issues. And if not,  
15 then we have a procedural problem that you have made. So we  
16 will be in brief recess. And I will give you ten minutes to  
17 try to resolve this and have a convenience break. We'll be in  
18 recess.

19 (Recess taken from 9:27 to 9:41)

20 THE COURT: So we're back on the record. Counsel are  
21 present and there was a discussion, I hope that you folks had,  
22 regarding the Plaintiff's tendered exhibits. Are there any  
23 stipulations regarding these exhibits?

24 MR. MINNIG: Yes, Your Honor. The only documents  
25 that we're stipulating to are going in, so there's no

1 discussion otherwise.

2 THE COURT: So in other words --

3 MR. MINNIG: That's --

4 THE COURT: -- exhibit that was tendered at the  
5 beginning of the case which is the October 26th, 2017, letter?

6 MR. MINNIG: Yes, Sir.

7 THE COURT: Okay. And is there anything else that  
8 you have of this witness or do you wish to proceed?

9 MR. MINNIG: Oh, no. I'm -- no, I'm sorry. I must  
10 -- I must have misstated there. We -- we have a series of  
11 exhibits here that we have stipulated to.

12 THE COURT: Okay.

13 MR. MINNIG: And there are no objections and  
14 otherwise we don't have any other exhibits.

15 THE COURT: Which -- which ones?

16 MR. MINNIG: So it will be Exhibit 2, page 1; Exhibit  
17 3; Exhibit 10; Exhibit 13; Exhibit 14; Exhibit 15;  
18 Exhibit 17 --

19 THE COURT: Hold on, 14, 15, 17?

20 MR. MINNIG: Yes, Sir. Exhibit 18, Exhibit 20,  
21 Exhibit 23, Exhibit 30, Exhibit 31, 32, 34, 35, 36, and 37.

22 THE COURT: Okay.

23 MR. MINNIG: And all of those were referred to except  
24 for 35, which is the rules and regulations, which is a website  
25 document available. And other than that, all of those

1 documents were referenced during this testimony.

2 THE COURT: They were referenced but they were not  
3 admitted absent the stipulation?

4 MR. MINNIG: Correct, Your Honor.

5 THE COURT: All right. Well, just for practical  
6 purposes, so that you folks can adjust accordingly, whether it  
7 be this case or other cases, it's helpful to either stipulate  
8 in advance. That's why I asked, because then I can review it  
9 contemporaneous with what this witness is talking about. I  
10 have not purposely looked them because I didn't know whether  
11 there was a stipulation nor if there was an objection.

12 So I'm -- we'll be looking at these in the abstract  
13 afterwards. But for future purposes, move contemporaneous  
14 admission of these so that we can rule as to whether they're  
15 objected to or not or yesterday you could have talked with each  
16 other and said here are the proposed stipulations, come in with  
17 an exhibit notebook and we wouldn't have this downtime.

18 So does the Plaintiff have another witness?

19 MR. MINNIG: Yes, Your Honor.

20 THE COURT: Then you may -- you -- well, let me just  
21 pause for a moment because I wanted to find out because we have  
22 cross-examination that needs to occur. But I note that you  
23 only have less than ten minutes left. So cross-examination.

24 MR. DEIHL: Yes, Your Honor.  
25

**CROSS-EXAMINATION**

BY MR. DEIHL:

Q Mr. Channing. My name is Collin Deihl. I represent JD Armory.

A Hello.

Q We met this morning, correct?

A Yes, briefly.

Q Yes. You're familiar with the declarations pretty intimately, correct?

A Yes.

Q And am I right that under the first amendment to the second declaration any powers granted to the architectural control committee may also be exercised and performed by the board?

A Yes.

Q If you could take a look at the October 26th, 2017 letter which was marked as Exhibit 3. Do you have that in front of you? Do you have that in front of you?

A Yes, I do.

Q And this is a letter that you wrote to JD Armory, correct?

A This is an email that was sent but to JD Armory, yes.

Q Okay. And we looked at Exhibit 2 and in Exhibit 2 you indicated that this was a formal request by JD Armory to the board, right?



1           A     Yes.

2           Q     Thank you.  And I'm sorry, I misspoke.  I meant  
3 Triple J Armory to the board, correct?

4           A     Yes.  That's correct.

5           Q     Okay.  I've got JD on my mind.  I apologize.  And in  
6 this letter, you were reporting back to Triple J Armory the  
7 action of the board based on that formal request, right?

8           A     That's correct.

9           Q     And in this letter, you wrote that the use of this  
10 property as a retail gun sale shooting range fell within the  
11 permitted uses at Southpark, right?

12          A     I wrote in here that the board -- Southpark Owners  
13 Association had no objection to the proposed use of the  
14 building in question as a retail gun sale and shooting range.  
15 And it would fall within the permitted uses.

16          Q     So you told Triple J that this fell within the  
17 permitted use based on their formal request to the board,  
18 correct?

19          A     That a gun store or gun range would fall within a  
20 permitted use.  That's correct.

21          Q     Okay.  And then the next paragraph of this letter,  
22 you explained the architectural review process to Triple J,  
23 correct?

24          A     We give a little synopsis of the review process, yes.

25          Q     And the synopsis of that review process was if you

1 make changes to the exterior of the building, you're going to  
2 need to come to us for architectural review. But if you make  
3 changes to the interior of the building, you don't need to,  
4 correct?

5 A Unless the interior would affect the exterior  
6 elements, yes.

7 Q So and then you talked a little bit about that. If  
8 you put an HVAC system on the roof, you might need approval of  
9 the board for putting an HVAC system on the roof, right?

10 A That's correct.

11 Q Or if you have to put up a new sign, you might need  
12 to make an application for the new sign, right?

13 A You would have to. Signage is a separate submittal  
14 to the ADCC.

15 Q But if all you're doing is making changes to the  
16 interior of the building, you don't need approval of the  
17 architectural committee, correct?

18 A Unless you were changing the use.

19 THE COURT: Okay. Let -- let's just be clear because  
20 they have limited time.

21 THE WITNESS: Okay.

22 THE COURT: So you didn't answer his question. You  
23 gave him the exception. So in other words, answer his question  
24 and then your lawyer's entitled to allow you --

25 THE WITNESS: Sure.

1 THE COURT: -- to grant to ask you the exception.

2 THE WITNESS: Ask the -- ask the question again,  
3 please?

4 Q (By Mr. Deihl) You don't need -- if you're -- if  
5 Triple J Armory is simply making changes to the interior of its  
6 building, as you put in this letter, it doesn't need approval  
7 of the architectural review committee, right?

8 A That would be correct.

9 Q And at this time when you wrote this letter to Triple  
10 J, there had already been a gun store in the Southpark  
11 community, right?

12 A That's correct.

13 Q There was another owner who operated a gun store in  
14 that community, right?

15 A Yes, there was.

16 Q And you wrote this letter after this board meeting,  
17 right?

18 A That's correct.

19 Q And this -- this letter reflects your understanding  
20 as the manager of the Association of the requirements of the  
21 Southpark declaration and its rules and regulations, right?

22 A Well, this was to the board's decision on the use,  
23 whether a gun store gun range would be a -- a permitted use in  
24 Southpark.

25 Q And you -- you said you were pretty familiar with the

1 declaration, right? That is Exhibit 37, I believe. Do you  
2 have that in front of you; 36, I'm sorry. Exhibit 36.

3 A Yes, I have it in front of me.

4 Q And if you take a look at section 4.2.

5 A I have 4.2 in front of me.

6 Q And that section discusses approval of plans by the  
7 architectural review committee, right?

8 A It does.

9 Q And it talks about improvements, right?

10 A It does talk about improvements, yes.

11 Q And improvements is a defined term in the  
12 declaration, correct?

13 A It is.

14 Q And improvements refers to exterior changes to the  
15 building, right?

16 A I would have to go back and re-read that definition  
17 of improvements.

18 Q Go ahead and look at section 1.4.

19 A Okay. Would you like me to read it?

20 Q My question was improvements refers to exterior  
21 changes to the building, right? New buildings or changes to an  
22 existing building on the exterior, correct?

23 A Give me a moment to read it, please.

24 Q Certainly.

25 (Pause)

1           A     Okay. I've read it. What was your question again?

2           Q     The definition of improvements refers to external  
3 changes to existing buildings or the construction of a new  
4 building, correct?

5           A     It does.

6           Q     If you take a look back at your letter, Exhibit 3,  
7 the third paragraph. Do you have that in front of you?

8           A     I do.

9           Q     And in Exhibit 3, you indicate that if the proposed  
10 gun range makes noise, it could pose a nuisance to adjoining  
11 property owners and that could object Triple J to covenant  
12 violations at Southpark which could result in the assessment of  
13 fines. Do you see that?

14          A     Yes, I do.

15          Q     And that was your understanding and is your  
16 understanding of Southpark's -- of the -- SPOA's authority,  
17 correct?

18          A     Right. They have a certain set of covenants for --  
19 that's correct.

20          Q     And you go on to say "Southpark does not anticipate  
21 this being an issue as gun ranges are constructed all the time  
22 in such a manner as to fully deaden shield noise." Do you see  
23 that?

24          A     I do.

25          Q     And that was your understanding when you wrote this

1 letter, right?

2 A We would expect them to build a -- a range that would  
3 be compliant, yes.

4 Q And you understood that the -- that SPOA had the  
5 authority to fine Triple J if Triple J violated the covenants,  
6 right?

7 A They do have that authority, yes.

8 Q So if Triple J opens and operates and the gun range  
9 makes more noise than is allowed by your covenants or creates a  
10 nuisance to the neighbors from that noise, you have the ability  
11 to fine Triple J and prevent that, right?

12 A Well, I don't know that we have the ability to  
13 prevent it, but we have the ability to fine them, yes.

14 Q Okay. You mentioned on your direct examination that  
15 Triple J wouldn't sign the SPOA form. Did I get that right?

16 A If you're talking about the review fee  
17 acknowledgement form, a signed form was not submitted.

18 Q Okay.

19 MR. DEIHL: And if I could approach?

20 THE COURT: Yes.

21 MR. DEIHL: Your Honor, may I approach?

22 THE COURT: Yes. Thank you.

23 Q (By Mr. Deihl) Mr. Channing, I've handed you what I  
24 believe is the review fee acknowledge form. Can you identify  
25 that?

1           A     Yes, I can -- I can identify it as the review fee and  
2 acknowledgement form.

3           Q     And that's the form that in the summer of 2018 you  
4 asked Triple J to sign when it submitted its subsequent change  
5 of use application in that letter in July and when it submitted  
6 its interior improvement plans to the Association, right?

7           A     This would be the required form to be signed, yes.

8           Q     And if you'd look at paragraph seven of that form.  
9 Towards the middle of that paragraph, there is a sentence --  
10 I'm sorry, paragraph nine of that form. I misspoke. Do you  
11 see paragraph nine?

12          A     Yes, I do.

13          Q     And paragraph nine purports to release the  
14 Association or any of its board members from any liability; is  
15 that correct?

16          A     Which sentence are you referring to?

17          Q     Paragraph nine.

18          A     Yes.

19          Q     And so if Triple J had signed this form, Triple J  
20 would have been releasing liability of the Association and the  
21 board for the actions that the Association and the board were  
22 taking in respect to promising Triple J that Triple J's use of  
23 the gun store and gun range was a permitted use, right?

24          A     Would you ask me that again, please?

25          Q     If Triple J had signed this, was it your opinion,

1 your understanding that Triple J would be waiving its legal  
2 rights against the Association?

3 A You know, I'm not an attorney and this part was  
4 drafted by Association Counsel some time ago. I don't know if  
5 I'm qualified to answer that honestly.

6 Q Fair enough. I'll withdraw the question. It's --  
7 are -- are you familiar with the improvements that have been  
8 made to date at the site?

9 A No, not entirely.

10 Q Okay. Are you aware of any changes to the exterior  
11 of the building that have been made to date?

12 A No, I'm not.

13 Q If there had been changes to the exterior of the  
14 building, would the -- without the approval of the Association,  
15 would the Association have the authority to order Triple J to  
16 remove those external improvements?

17 A I presume that they would after a, you know, after a  
18 hearing.

19 Q If the Court later determines that a retail store  
20 opened improperly, what sort of irreparable harm, if any, would  
21 -- would SPOA suffer?

22 A Well, I don't know specifically how to -- to answer  
23 that other than to say that it may be why way of an example.  
24 If a retail store opened and their parking requirements were  
25 such that they created an impact on other surrounding



1 properties, then that would be one way.

2 Q And you met with Triple J back in May of this year to  
3 discuss parking, did you not?

4 A We had an informal meeting with Triple J. Yes,  
5 that's correct.

6 Q And -- and -- and then the purpose of that meeting  
7 was to discuss parking, right?

8 A No, I wouldn't say that it was just to discuss  
9 parking. That may have been one of the -- that may have been  
10 something that was discussed, but it wasn't -- wasn't the only  
11 issue discussed.

12 Q You did discuss parking at that meeting, right?

13 A You know, we may have. I don't -- I can't say  
14 specifically, but I could say that we may have discussed  
15 parking.

16 Q That's fair. You talked a little bit about the  
17 reciprocal easement. You're familiar with that document?

18 A I've become somewhat familiar with it, yes.

19 Q Okay. And that is a -- an easement that governs the  
20 building site where this proposed use is going to occur, right?

21 A That's correct.

22 Q And it -- it only applies to the owners of those two  
23 building sites, correct?

24 A It is specific to those two buildings on that site,  
25 yes.

1           Q     So the parties to that easement are the two owners of  
2 those two buildings, correct?

3           A     As far as I know from reading that document, yes.

4           Q     And it governs the common use between those two  
5 buildings, right?

6           A     It does.

7           Q     And it gives the owner of one building the right to  
8 use the parking of the other building and the owner of the  
9 other building the right to use the parking of -- in other  
10 words, they get to use each other's parking space, correct?

11          A     That's how it appears, yes.

12          Q     There's no entity called Parklane Business Park. It  
13 doesn't exist, right?

14          A     I think that's what's defined or stated in that  
15 reciprocal easement and declaration of covenants. I -- I  
16 believe that's what they call it, Parklane Business Park.

17          Q     But there's no such entity. It's never been formed  
18 to your knowledge, correct?

19          A     Well, I presume it was formed by that recorded  
20 document. If it wasn't formed in that manner, then I don't  
21 know.

22          Q     Okay. And section 1.4 of that agreement refers to a  
23 common area manager, but it says that the common area manager  
24 no longer has any power once the original developer sells his  
25 property. Are you familiar with that?

1 A I'd have to look at that. What's the exhibit?

2 Q That's fine.

3 A Okay.

4 Q I don't think I -- let me -- let me check my notes to  
5 see if I have anything further.

6 THE COURT: Thank you.

7 MR. DEIHL: All right. I think that's all I have.  
8 Thank you.

9 THE COURT: Well, I think Co-Council wants to talk  
10 with you.

11 MR. TESELLE: Your Honor, I do briefly have --

12 THE COURT: Please.

13 MR. TESELLE: -- a couple questions on this one  
14 exhibit.

15 THE COURT: Sure. Which exhibit?

16 MR. TESELLE: Exhibit 37.

17 THE COURT: Thank you.

18 **CROSS-EXAMINATION**

19 BY MR. TESELLE:

20 Q Good morning, Mr. O'Dell.

21 A Hello.

22 Q I haven't spoken yet this morning. My name is David  
23 Teselle from Burg Simpson. I'm here on behalf of Southpark  
24 Lane, LLC. Let me -- just to clarify the record and your  
25 testimony earlier, you testified that certain letters that you

1 had sent to the (indiscernible) were to the owners of the  
2 property. You're aware that the actual owner of the parcel in  
3 question here is Southpark Lane, LLC, correct?

4 A Yes, sir.

5 Q And the (indiscernible) are members of that LLC?

6 A I -- I --

7 Q That's your understanding?

8 A -- I'll take you at your word that they are. That's  
9 the information we have in our file.

10 Q All right. I just have a couple of questions  
11 regarding Exhibit 37. If we can turn to that document, if you  
12 have it in front of you?

13 A I have it in front of me.

14 Q Okay. To be clear, the title of this document is "A  
15 Grant of Reciprocal Easements," correct?

16 A Yes, it says --

17 Q And declaration of covenants?

18 A Right. Parklane Business Park.

19 Q You're familiar with easements in -- in your role as  
20 a -- as a manager, correct?

21 A Yes.

22 Q And an easement, that's a -- that's a grant of a  
23 property right or obligation, correct?

24 A Yes.

25 Q When -- when -- generally speaking, when an easement

1 is created, that doesn't automatically create another entity,  
2 correct?

3 A I would agree with that, yes.

4 Q Okay. It's an agreement between two property owners  
5 or -- or that's binding on two property owners going forward,  
6 correct?

7 A Yes.

8 Q Now, there's been an argument made in -- in -- in the  
9 filings about there being some subassociation. Is this  
10 easement listed as a subassociation on the website that was  
11 referred to?

12 A You're talking about the Southpark?

13 Q Whatever you're -- whatever you're calling it.

14 A No, the Southpark Owners Association only has its  
15 governing documents on its website.

16 Q But does it list as subassociations this easement or  
17 any other easement as created a subassociation?

18 A It does not state that on the website, no.

19 Q Are you -- are you familiar with an easement ever  
20 being a subassociation on any of the properties that you've  
21 managed?

22 A Not in easement per se, no.

23 Q Okay. And I'm not going to over the questions that  
24 were asked on this before, but I do want to refer you to  
25 paragraph 14, I believe, 14.1. And you see in this easement in

1 paragraph 14.1, it says negation of partnership; do you see  
2 that where you're at?

3 A I do, yes.

4 Q Can you -- can you read that sentence into the --  
5 into the record, please?

6 A It says "None of the terms or provisions of this  
7 declaration shall be deemed a creative partnership between or  
8 among the owners in their respective businesses or otherwise,  
9 nor shall it cause them to be considered joint ventures or  
10 members of any joint enterprise. This declaration is not  
11 intended nor shall it be construed to create any third party  
12 beneficiary rights to any person who is not a party hereto  
13 unless expressed otherwise -- expressly otherwise provided."

14 Q Okay. And -- and the only reference to -- to the  
15 words "Parklane Business Park" is in the -- the top -- in the  
16 title of the document, correct?

17 A I know it's there. I'd have to go through the  
18 document and see if it's listed any place else?

19 Q Okay. But -- but in preparing for your testimony  
20 today and -- and in giving your testimony earlier that I think  
21 the words used were you're calling it for this -- these  
22 purposes a subassociation, you -- you're not aware as I ask you  
23 now that that "Parklane Business Park" word -- words are used  
24 anywhere else in this document, correct?

25 A Well, as I just stated, I'd have to go through and

1 read it.

2 Q Fair enough. In fact, that's a reference to a  
3 location. You talked about different locations on the property  
4 and this is the business park, correct?

5 A I would -- I would agree that Parklane Business Park  
6 is also a location, yes. It's made up of two -- two sites.

7 Q You're -- you're familiar and I think the --  
8 generally this question was asked. You're aware that there --  
9 this applies to two partial owners and the other partial owner,  
10 that's RHR Investment, LLC, correct?

11 A That's as I understand it, yes.

12 Q Okay. And they -- and they -- and they've been named  
13 in this lawsuit also by SPOA, correct?

14 A They have, yes.

15 Q Okay. And -- and -- and you're not aware of any  
16 objection that they're making even if there was an argument  
17 which I don't believe that there is. But I -- you're not aware  
18 of any objection that they've made or that they're making to  
19 the use of -- on this parcel, correct?

20 A They -- they -- the RHR is making --

21 Q Yes.

22 A -- to the use of the parcel --

23 Q You're not aware of any objection?

24 A -- as a gun store or gun range.

25 Q Yes.

1           A     Yes.

2           Q     Okay.  You are aware?

3           A     Yes.

4           Q     Okay.

5           A     They've made that clear.  They've attended the  
6 various community meetings.  They've come to a Southpark board  
7 meeting.

8           Q     Okay.

9                 MR. TESELLE:  That's all the questions I have, Your  
10 Honor.

11                THE COURT:  Thank you.  I have a few questions and  
12 just want to follow up and I'll let Counsel follow up with some  
13 of the questions that I have.

14                As I understand your authority, your authority is  
15 such that you can fine the Southpark Owners Association by  
16 statements that you've made?

17                THE WITNESS:  As an agent, I understand that to be my  
18 authority, yes.

19                THE COURT:  Okay.  And I was looking at the exhibit  
20 that was admitted -- or stipulated to which was the documents  
21 dated October 26th, 2017.  Do you remember that document?  It's  
22 the email correspondence between you and JD?

23                THE WITNESS:  And that's Exhibit 3, Your Honor?

24                THE COURT:  Well, it may be part -- part and parcel  
25 of it, but nonetheless it is the stipulated document.  Let me



1 show you what it is so that you're looking at the same thing I  
2 am.

3 THE WITNESS: Yes.

4 THE COURT: Okay. It looks like it's perhaps in a  
5 different format. But nonetheless, it's still the same, isn't  
6 it?

7 THE WITNESS: Yes.

8 THE COURT: So what triggered the motion for the  
9 preliminary injunction? What fact occurred that triggered you  
10 folks filing this?

11 THE WITNESS: This action here?

12 THE COURT: Yes.

13 THE WITNESS: We had a -- from Southpark's point of  
14 view, there is a -- a change of use going on at a property that  
15 was an office warehouse to a retail gun store, gun range  
16 application. The change of use of a property requires the  
17 approval of the Southpark Owners Association. And then further  
18 to that, if a change of use is submitted for and say that it's  
19 even approved, a change of use does not automatically guarantee  
20 that a specific project is approved. A submittal has to be  
21 made for that project as well to proceed. Those are all given  
22 to the Southpark architectural control committee. It can be  
23 done separately or concurrently and they would review those.

24 THE COURT: So as Counsel asked you a moment ago in  
25 Exhibit Number 2, they said that this was a formal request.

1 Counsel, can you have a seat?

2 MR. MINNIG: I'm sorry.

3 THE COURT: I'm asking a question now.

4 MR. MINNIG: I'm sorry.

5 THE COURT: Counsel had asked you whether this was a  
6 formal request by Triple J to have a formal request for a  
7 permitted use; is that correct?

8 THE WITNESS: Yes, that's correct.

9 THE COURT: And in this exhibit, Exhibit A, that was  
10 stipulated to, you say that there is no objection from  
11 Southpark Owners Association. Why is that different than what  
12 you call the triggering use today?

13 THE WITNESS: Well, a permitted use --

14 THE COURT: Uh-huh.

15 THE WITNESS: -- could be somebody asking whether  
16 this use is permitted within Southpark.

17 THE COURT: Isn't that what you say in Exhibit A?

18 THE WITNESS: We say that it is -- that we find it to  
19 be a permitted use within Southpark and that's one step in the  
20 process. Whereafter, you would make your application to the  
21 architectural development control committee to change your use  
22 currently office warehouse, as I understand it, to be retail  
23 gun store gun range. They're two separate processes.

24 THE COURT: Okay. So the second paragraph within  
25 this exhibit, it talks about any potential changes that have

1 occurred on the exterior. On cross-examination just now, you  
2 said you've not -- you are not aware of any; is that right?

3 THE WITNESS: That's right. I have not been by -- I  
4 haven't seen them do anything on the exterior other than they  
5 did some parking lot repairs. At one time -- one point in  
6 time, they had some equipment set up for cement work that was  
7 going on in the interior. But I -- I haven't seen them make  
8 any other physical changes to the exterior of the property.

9 THE COURT: So the changes that have been made have  
10 actually been to either maintain or improve?

11 THE WITNESS: Either to maintain the exterior and  
12 they were doing something on the interior that was then stopped  
13 by the city, but I don't know what that was.

14 THE COURT: Okay. I'm only talking about your  
15 knowledge about things that you have in your possession, not  
16 about interior because you don't know what's happened on the  
17 interior, right?

18 THE WITNESS: I do not, no.

19 THE COURT: So on the exterior, whether it be asphalt  
20 or parking issues, the only thing that you're aware of is that  
21 they've either maintained or improved it?

22 THE WITNESS: That would be correct.

23 THE COURT: Okay. Are there further questions on  
24 redirect examination based on the questions that I have asked?

25 MR. MINNIG: Well, I had some -- to ask, but I will

1 -- and -- and as well as you did too.

2 THE COURT: Okay. You -- okay.

3 Q (By Mr. Minnig) The letter that the -- that the  
4 Judge is referring to, you distinguished between the permitted  
5 use issue, which we don't argue at all. This is a permitted  
6 use and they have the right to put a gun range -- gun retail  
7 store on this premises. That's correct, right? We're not  
8 arguing that?

9 A Well, they have the -- the ability to put it in  
10 Southpark. It would be the permitted use within the Southpark  
11 Owners Association.

12 Q Correct. But then the second part that we've been  
13 talking about and that's required by our recorded documents in  
14 that the -- many of these letters refer to and the Judge hasn't  
15 -- wasn't reviewing as we went through them, they -- they are  
16 all concerning the change of use and the effect of the change  
17 of use on the parking and other issues; is that not correct?

18 MR. DEIHL: Object to the form of the question.

19 THE COURT: Sustained.

20 MR. MINNIG: I'm sorry. I'm just trying to move  
21 things along.

22 THE COURT: No, it's compound, multiple as well as  
23 leading.

24 Q (By Mr. Minnig) Okay. So by that letter that you  
25 gave, did you -- was it your intent or did you in any way

1 intend to waive the requirements of a submittal and approval  
2 process by SPOA?

3 MR. DEIHL: Same objection.

4 THE COURT: Overruled.

5 THE WITNESS: No.

6 Q (By Mr. Minnig) And in fact, there were several  
7 correspondence after that letter in which JD -- excuse me I've  
8 got the same problem -- Triple J Armory in fact accepted the  
9 reality that they had to do a -- a submittal and approval  
10 process?

11 A Yes.

12 Q But they didn't want to do it the way that the rules  
13 said and that the document said. They wanted to do it on their  
14 terms. Is that a fair statement?

15 MR. DEIHL: Object to the form of the question.

16 THE COURT: Sustained.

17 Q (By Mr. Minnig) Okay. Real quick. We -- we  
18 referred to Exhibit 15. Do you see that?

19 A Yes.

20 Q And that letter is now in evidence and that letter is  
21 -- is Triple J stating that they were going to do a submission  
22 and approval process for purposes of a change of use; is that  
23 not correct?

24 A That's what it says, yes.

25 Q Okay. And there's repeated documents in there,

1 exhibits that we referred to during your testimony which were  
2 letters from you or from me to either the owner or Triple J  
3 explaining the process for doing this process, the submittal  
4 and acceptance process; is that not correct?

5 A Yes, it is.

6 Q And in fact, and in Exhibit 1, that's the document  
7 where two years previously Triple J had done -- had started and  
8 done the submittal and acceptance process and then it went  
9 away?

10 MR. DEIHL: Objection. Exhibit 1 is not in evidence,  
11 Your Honor.

12 MR. MINNIG: Oh, I'm sorry. We didn't put that one  
13 on evidence?

14 MR. DEIHL: No.

15 Q (By Mr. Minnig) Okay. Could you take a look at  
16 Exhibit 1?

17 MR. DEIHL: And it hasn't been discussed on prior  
18 testimony either. It's beyond the scope of --

19 MR. MINNIG: But we did talk about the fact that they  
20 did --

21 THE COURT: Hold on, Counsel. Let him finish and  
22 then let me hear argument. This isn't a city council meeting.  
23 It's just --

24 MR. MINNIG: I'm -- I'm sorry, Your Honor.

25 THE COURT: I understand. But there's still a

1 process and procedure. How do you respond to the question of  
2 scope?

3 MR. MINNIG: Your Honor, we did, in fact, discuss  
4 during -- it may have not been on the direct. I admit -- I'm  
5 not sure they said. But on the -- we didn't put the document  
6 -- you -- the Court was not looking at the document. We did  
7 put it in during the -- we didn't put it in. This goes to the  
8 evidence that Triple J, as he was just discussing, knew of the  
9 process and that this is part of our process.

10 THE COURT: The objection's sustained on scope  
11 grounds.

12 MR. MINNIG: Okay.

13 Q (By Mr. Minnig) So -- oh, under the reciprocal  
14 agreement that we were talking about, does that document not  
15 require Southpark Owners Association to treat the two entities  
16 as one property?

17 A It tells them they have to treat it as one building  
18 site, yes.

19 Q And -- and did we not receive a specific letter --  
20 didn't we receive a specific letter from the owners of -- from  
21 the other party, not the owners of the -- the landlords of the  
22 property, but the other member of the entity that we would --  
23 that that was a protest letter concerning the -- the building  
24 of a range on that site?

25 A You're talking about the -- the other owner of the

1 parcel at 8122 Southpark Lane --

2 Q Yes, sir.

3 A -- RHRs?

4 Q Yes, sir.

5 A Yes. Yes, we did.

6 Q Would you take a look at Exhibit 12 quickly?

7 A I have it.

8 Q Is that the letter that we're discussing?

9 A Yes.

10 MR. MINNIG: And if -- I would, Your Honor, I would  
11 move Exhibit 12 into evidence.

12 THE COURT: Any objection or voir dire to 12?

13 MR. DEIHL: Yes, Your Honor. I do object to the  
14 admission of this. I don't know who (indiscernible) -- whoever  
15 the write of this is. It's not signed.

16 THE COURT: How do you respond to the hearsay?

17 Q (By Mr. Minnig) Let's identify who the writer is  
18 first?

19 THE COURT: It's an out of court statement just so  
20 for the truth of the matter. The objection's sustained.

21 Q (By Mr. Minnig) Okay. All right. And who's -- so  
22 -- well -- so as far as -- just so we understand, after your  
23 letter that the Judge's been referring to the -- the first  
24 document that was stipulated in, there was extensive -- at that  
25 point in time, did you have sufficient knowledge of what the



1 building plans were, what the parking requirements would be or  
2 anything like that so as to waive all of the requirements of  
3 Southpark and allow -- and -- and get rid of the submission and  
4 approval process?

5 A No.

6 Q And do you at this point remember anything about the  
7 discussion of the extent of the -- of the shooting range that  
8 was going to be built at that point in time?

9 MR. DEIHL: Your Honor, I object. This is way beyond  
10 the scope of the cross.

11 THE COURT: I'm going to allow it because I asked  
12 certain questions regarding whether or not there was in fact  
13 compliance and the extent of his knowledge.

14 THE WITNESS: What time frame are you talking about?

15 Q (By Mr. Minnig) Before the date of the letter that  
16 you wrote that concerned --

17 A On October 26th?

18 Q Yes.

19 A No. We had had nothing to review.

20 Q And a change of use may in fact trigger a change in  
21 the parking requirements or the property; is that true?

22 A Absolutely.

23 Q And that change of parking is an exterior portion of  
24 the property; is that not correct?

25 A It would be, yes.

1 Q And to this date, have you received any sufficient  
2 documentation to allow you to make those determinations?

3 A We have not received a property submittal to date.

4 Q And there was a question here about each party using  
5 the other party's parking lots; are you aware of that?

6 A I am aware of that.

7 Q Now, if the use of the parking is not exclusive to  
8 the building in question, does Southpark consider that parking  
9 as part of the requirement?

10 A It would not consider that as part of the  
11 requirement.

12 Q Okay. Now, you -- there was the question that we  
13 could enforce this after the fact. If in fact, in your  
14 experience -- let's talk about your experience. This is not  
15 the only ownership association that you represent, is it?

16 A It is not, no.

17 Q How many would you say you were --

18 THE COURT: Counsel, your time is up.

19 MR. MINNIG: Okay.

20 THE COURT: Thank you. Were there further questions  
21 based on the questions that I have asked? Now, ordinarily I  
22 don't open it up but because I asked questions, were there  
23 anything further on behalf of the Defense?

24 MR. DEIHL: Not from me, Your Honor.

25 MR. TESELLE: Not from me, Your Honor.

1 THE COURT: Okay. Thank you. Let me -- and you may  
2 have a seat, sir.

3 That is the Plaintiff's case in chief as it relates  
4 to any motions. Are there any motions?

5 MR. DEIHL: Yes, Your Honor. I -- I make a motion  
6 under Rule -- I make a motion under Rule 50 to deny the pending  
7 motion for preliminary injunction on the grounds that the  
8 Plaintiff has not met its burden of proof under the Rathke  
9 factors. There has been no proof of irreparable harm. There's  
10 been no proof that there isn't any plain, speediatric  
11 (phonetic), quick remedy at law; in other words, a declaratory  
12 judgment from this Court.

13 There has been no proof that the preliminary  
14 injunction will disserve the public interest. In fact, it's  
15 just the opposite. We have a piece of real estate that isn't  
16 being used and the public is being disserved by having this  
17 project halted. There's no -- very little proof on the balance  
18 of the equities that favor the injunction. In fact, Your  
19 Honor, I would submit that the balance of the -- the proof has  
20 been that the balance of the equities favor Triple J Armory  
21 because Triple J Armory has been stalled in its project and is  
22 spending substantial amounts of money every day as this project  
23 is halted.

24 And finally, Your Honor, the status quo at the time  
25 this injunction was filed on September 5th was that there had

1 been an approved use by the Association back in October of 2017  
2 and that there had been interior improvements to the building  
3 and that was all. There were no exterior improvements. Thank  
4 you.

5 THE COURT: Let me hear from the Plaintiff and let me  
6 just focus your attention to a couple specific issues. Let's  
7 assume that there is a violation of the covenants that require  
8 approval from the architectural board. Let's assume that for a  
9 moment. What is the irreparable injury? What is the known  
10 violation? Where is the noncompliance that you know of today?

11 MR. MINNIG: Well, Your Honor, it's hard for me to  
12 point to the evidence of the supposed extraordinary amounts of  
13 money that have been -- that have been spent on this project  
14 because that's not in evidence yet.

15 THE COURT: Well, the burden of proof is on you.

16 MR. MINNIG: I -- I

17 THE COURT: So then where is the irreparable injury?

18 MR. MINNIG: So Your Honor, I -- I -- to -- to follow  
19 up on that, we have been sued and it's in the court record, for  
20 8 million dollars.

21 THE COURT: Hold on. Hold on. Timeout.

22 MR. MINNIG: Uh-huh.

23 THE COURT: I have a motion for preliminary  
24 injunction before me. I'm not taking judicial notice of  
25 anything else. Whether you have been sued is a product for

1 something else for another court and/or jury. I don't even  
2 know the complaint in that case. Furthermore, that was not  
3 part and parcel of your motion here to say that there was a  
4 basis for an injunction because you have been sued in another  
5 matter. Your claim was that there was irreparable injury in  
6 this litigation. So let's focus on what this litigation is.

7 MR. MINNIG: Your Honor, this is an injunction in  
8 furtherance of covenant enforcement. An in covenant  
9 enforcement, the Court has the basis under case law to  
10 formulate a remedy that fits the facts. Quite often, the issue  
11 is tearing down a building versus some other remedy.

12 At this point, if we don't stop the construction and  
13 we allow the construction to go forward until such time in the  
14 future, the Triple J Armory has proven today that they are  
15 going to go forward in light of anything that takes place and  
16 continue to do the construction, continue to spend the money.  
17 As that money gets spent, the -- that -- that creates a harder  
18 level of us to overcome in the future. Moreover, Your Honor,  
19 the -- the -- without -- we can't even do our job because we  
20 don't have the money to pay the experts to review what's going  
21 to take place on this job. This is a contract case plain and  
22 simple. And the contract piece has not been admitted. But we  
23 cannot enforce our contract in a proper fashion as more and  
24 more work gets done down the -- down the line.

25 This creates the problem that exists in -- in

1 restrictive covenant enforcement over and over and over again.

2 THE COURT: Counsel, you may have just made their  
3 case. Let me ask you when you're saying that this is a motion  
4 for adjunctive relief for irreparable injury and now you're  
5 saying this is a contract case, why is this not then better  
6 heard for another day for a breach of contract? I'm asking you  
7 a very specific question. Where is the irreparable injury in  
8 terms of the facts? What variance has been occurred on the  
9 exterior of the building that is not permitted that is somehow  
10 causing harm?

11 MR. MINNIG: Your Honor, it's -- it's the enforcement  
12 of our requirements that must take place prior to construction.  
13 Because once construction begins and takes place, it becomes  
14 more and more difficult to seek and -- and receive the kind of  
15 remedy of making them undo what they're doing. We are seeking  
16 to -- to keep the status quo because the irreparable harm comes  
17 from the fact that as we go forward and the money is spent and  
18 the project is continued, they're doing a construction project  
19 without our approval. That's the whole thing.

20 THE COURT: Isn't -- isn't this letter of October  
21 26th, 2017 approval?

22 MR. MINNIG: No, Your Honor. It is not.

23 THE COURT: Why?

24 MR. MINNIG: And that's the -- that's the issue that  
25 the Court is -- is essential. The -- the letter was intended

1 for the approval of the use. And we don't argue that there is  
2 the right to put a building -- I mean, to -- to go forward with  
3 the use of a gun range and a -- and a -- and a -- a retail gun  
4 store. Those didn't exist before that letter. They didn't  
5 exist on that property. It was a medical building. It is now  
6 -- the whole building is being retrofitted for a change of use.

7 And Mr. Channing's statement that -- that it may be  
8 only limited to this and that has been changed over time. The  
9 -- the Court's emphasis on that letter is understandable, but  
10 is -- if you -- when you get a chance to review all the  
11 documents that have been put in, it has gone forward by the  
12 parties and recognized that there needs to be an approval  
13 process in a change of use process.

14 And so if in fact at the time that we go forward with  
15 a trial on this matter down the road months from now and  
16 there's been another, as stated by -- by Counsel, hundreds of  
17 thousands of dollars spent on this building, then our ability  
18 to enforce our easement -- I mean, excuse me -- our covenant  
19 agreements become more and more difficult every day. And we  
20 don't have the ability and the -- the -- it's clear that that's  
21 the -- that's what we're going to do. We're going to go  
22 forward with -- with the changes and the money being spent on  
23 the premises and everything else and it simply becomes harder  
24 and harder for us to enforce our rights. That's our  
25 irreparable harm.

1           THE COURT: If -- if I were to look at the Rathke  
2 factors and look at the equities in favor of the parties, not  
3 just one side. You're saying that you're going to have a  
4 threat of a lawsuit and potential damages which will cause harm  
5 to you.

6           MR. MINNIG: No, no, no.

7           THE COURT: Aren't there potential damages that are  
8 incurring now by the -- by the fact that an injunction is being  
9 requested and they cannot go forward?

10          MR. MINNIG: No, Your Honor. We're not saying that  
11 it's the fact of suing us. It's the -- it's the problem of  
12 undoing what's been done. I'm not saying that the lawsuit  
13 against us is not irreparable harm. We -- we understand that.  
14 We have a -- the right to defend ourselves in that in the  
15 future.

16          The irreparable harm, Your Honor, is simply that if  
17 the -- the Defendant continues to be able to spend money on the  
18 project, build the project, he has a -- I'm sure he has a loan  
19 that's being funded and is that on and on and on with all the  
20 problems of allowing him to go forward, the -- the ability to  
21 undo that becomes harder and harder and harder. And that's why  
22 the case law. This is a straightforward covenant enforcement  
23 action. It -- it has other things. And our right to  
24 injunctive relief is one of our -- our cited abilities in our  
25 -- our restrictive covenant documents.



1           We have the right, if you violate a covenant, to come  
2 in and seek injunctive relief to get you to stop doing it so  
3 that we don't have to do that later on. Because the case law  
4 is also clear once a building is -- you know, we're talking  
5 about retrofitting a medical building to turn it into a 22-lane  
6 shooting range. That's going to require millions of dollars,  
7 we're sure. But -- and once that gets done, if that's already  
8 done and we're in the court then trying to get it undone, that  
9 becomes hard and harder and harder for us.

10           And the case law says when you have -- if you build a  
11 building and you want to tear it down, the Court's got the  
12 right to fashion a -- remedy that's lesser than that. And we  
13 don't -- we don't have -- we don't want that. We want to stop  
14 it now and make sure that they have all things that they're  
15 supposed to have that our agreement says that they're supposed  
16 to do.

17           And we had to have it now. If we don't get it now,  
18 then we have the problem of down the road millions of dollars  
19 being spent. They're opening their doors. They've got  
20 customers coming in and then we have a loss -- then we have a  
21 litigation saying, oh, well, that -- that all sounds good and -  
22 - and -- and great, but the reality is we have all this done  
23 and we need to have some other remedy, what could that be. So  
24 we want to be able to check that.

25           And moreover, Your Honor, this is creating a gun

1 range out of medical building. So we have the -- our  
2 obligations to our neighbors, to our other members, to the  
3 school in the area, to the -- everybody else. We just need to  
4 make sure it's safe. And we don't know that yet. And safety  
5 is an issue.

6 THE COURT: Why -- why are you bringing this issue  
7 before me when Mr. Channing Odell wrote a letter saying that it  
8 was in fact approved?

9 MR. MINNIG: No, the use was approved.

10 THE COURT: So -- but you're also saying however --  
11 well, okay. I'm debating.

12 MR. MINNIG: Let -- just so that I -- this point is  
13 clear. Mr. O'Dell approved -- said that the Southpark Owners  
14 Association has no objection to the use. That doesn't mean  
15 that they waived all these other obligations. If in fact we  
16 want to make sure that this property is safe for the other  
17 people in the neighborhood, we have the right to do that. We  
18 have now been -- all those rights that we have to make sure  
19 this property is safe and is soundproof and that there's  
20 adequate parking and all of the other elements that are made up  
21 in our submittal and review process which he never waived and  
22 that was not waived, Your Honor. Just have to make sure.

23 This is like a -- this is exactly like a permitting  
24 process with the city in the first instance. The fact is that  
25 the city says okay, it's zoned properly but you then still have

1 to submit all of your building plans and all those things  
2 which, you know, which didn't take place in this case before  
3 construction was permitted. But that's -- that's their  
4 process. And they have the right to red tag them and stop them  
5 and they did. Our -- our remedy is to come into court and seek  
6 an injunction. And that's what we're here doing today. That's  
7 the only remedy we have to make sure that that the building  
8 doesn't get completely retrofitted, changed and millions of  
9 dollars spent on it and then we have to come in and argue from  
10 that position. And that's not the status quo.

11 And the equities are in our favor, Your Honor. We  
12 have to do that. We are an association of hundreds of members  
13 and we have that obligation to make sure that this property is  
14 developed in a way that's consistent with and compatible with  
15 the neighborhood and that all these safety, health, welfare,  
16 those are all in our documents as well as the simple issues of  
17 architectural control, parking, all these things are dealt  
18 with. And we have -- that's all been removed from us and the  
19 best way to do it from here on out is to enjoin the -- the  
20 construction until such time as the proper submittal and  
21 approval process is done.

22 We're really unripe for a lot of this stuff, Your  
23 Honor. This is -- we can't really even bring this because  
24 there has been no submittal. There has been no approval.  
25 There has been no review by anybody. There has not been an --

1 there's three things that can happen here. There could be  
2 acceptance. There could be a conditional acceptance which says  
3 okay, what you submitted is okay but you need to do A, B, and C  
4 to move forward. Or there could be a denial. And then he has  
5 a right to an appeal to the -- to the full board of that  
6 decision if he doesn't like it and then we have case. But  
7 we're -- now, we're sitting here and we're doing this before  
8 he's done the most basic step that's necessary.

9 Now, arguably, he wants you to believe that the most  
10 necessary -- the step that says is this a permitted use somehow  
11 allows him a carp launch to do whatever he wants on the  
12 construction as long as it doesn't physically change the  
13 outside of the building. And now that's becoming part of an  
14 issue because the city's saying you have to do certain things.  
15 We don't know what those are.

16 See, that's the thing is we don't know, Your Honor.  
17 We're being asked to shoot in the dark because we have never  
18 received a proper submittal. And we don't have the ability to  
19 review it. We want to -- we -- we get to turn our engineers  
20 loose on it. We have a full covenant contractual right. But  
21 in order to enforce that, we have to come into this Court and  
22 enjoin them from proceeding so that we can have the right to do  
23 that process before they come in here and say oh, we've got an  
24 SBA loan for 5 million dollars and it's all been funded and we  
25 can't undo that, Your Honor. That's the status quo that we're

1 asking the Court.

2           We believe the equities are in our favor because  
3 that's what our documents say. And when you reviewed the  
4 letters that went back and forth, you'll see that they agreed  
5 to this. They understood it. And they tried to do a half-  
6 baked job at getting it done and they didn't. They never --  
7 they never submitted -- and moreover, they made their  
8 submittals and said this is not a submittal. We reserve all  
9 our rights to sue you, but we're doing this as a -- as a --  
10 a --

11           THE COURT: Counsel, I've given you some latitude  
12 here.

13           MR. MINNIG: (Indiscernible).

14           THE COURT: The question was regarding directed  
15 verdict.

16           MR. MINNIG: I agree and I tried to argue what the  
17 irreparable harm is under the covenant enforcement issue and  
18 that is a regular issue. We have the right to enforce the  
19 covenant so that it doesn't become a million dollar question  
20 for them later on and we don't have to argue about undoing a 5  
21 million dollar retrofitted building. This is the time.  
22 Otherwise, that's the irreparable harm that comes to us when  
23 they go forward and they do all this process. And he's doing  
24 it and he's doing it as fast as he possibly can. And all we're  
25 asking for is a timeout, stop this thing until such time as you

1 give us the information we need to understand what you're doing  
2 because we don't. We don't have that information. And that  
3 was never the intent of Mr. O'Dell's letter. And when the  
4 Court gets a chance to review all those letters, you'll see  
5 that's where we are. Thank you, Your Honor.

6 THE COURT: Thank you. Any further argument by the  
7 Defense?

8 MR. DEIHL: Your Honor, very, very briefly because I  
9 realize we haven't even put on our case yet. Your Honor, I've  
10 heard that argument, but that ship has sailed. You saw the  
11 letter from October. They told us this was a permitted use.  
12 They knew which building we were talking about. They knew what  
13 we were proposing to do. We talked to them throughout the  
14 process. Mr. O'Dell testified about meetings in March, May.  
15 All of that occurred a year ago and then they decided to change  
16 the rules on us and decided to require us to submit all of our  
17 plans for interior renovations which we have given them. We  
18 have not made any changes to the exterior and the only  
19 application we've made for exterior changes is a signage  
20 application that the Association refused to process due to this  
21 case.

22 THE COURT: I'm going to take a recess. I'll have  
23 you folks come back at 11:00. I'll rule on the motion for  
24 directed verdict under Rule 50. And -- and if I deny it, then  
25 the Defense will be able to present your case in chief. So at

1 this point, we will be in brief recess.

2 (Recess taken from 10:36 to 11:00 a.m.)

3 THE COURT: We're back on the record in 18 CV 32126.  
4 Counsel are present as well -- as well as the clients. The  
5 Defense has moved for a motion for directed verdict and I must  
6 view the evidence in the light most favorable to the party  
7 against whom the motion is directed, and every reasonable  
8 inference to be drawn from the evidence is to be considered in  
9 the light most favorable to that party.

10 Here, the Plaintiffs have filed a motion for a  
11 temporary injunction or a protection order in connection with  
12 the continued construction associated with a retail gun shop as  
13 well as a shooting range known as Triple J Armory. The  
14 Plaintiffs have tendered the testimony of Mr. Channing O'Dell  
15 and there have been a variety of documents that have been  
16 either stipulated and/or admitted into evidence. The documents  
17 specifically are Exhibit A and then of course the Counsel had  
18 referenced 2 through 10, 13, 14, 15, 17, 18, 20, 23, 29 through  
19 34 and 35 through 37.

20 The document that is most important to me is this  
21 stipulated Exhibit A. Let me tell you that when I got this  
22 case, I reviewed it. I reviewed the complaint. I saw that  
23 there was a factual basis and a legal argument for the purpose  
24 of having this hearing today. When I received the Defense's  
25 response together with their offer of proof in connection with

1 their response as to why it should not be granted and then  
2 referenced again to this letter and/or exhibit dated October  
3 26th, 2017, it made me wonder why I didn't get this earlier.  
4 That's why I asked at the very outset of this hearing are there  
5 any stipulations, where's this exhibit, and I was very excited  
6 to hear from the testimony of Mr. Channing O'Dell.

7           What he testified is that he is the manager of Custom  
8 Management Group and that he has the authority to bind  
9 Southpark Owners Association. Exhibit 2 together with Exhibit  
10 A is a series of correspondence, but particularly through  
11 examination Mr. O'Dell testified that this comprised of Triple  
12 J's formal request to the board. And so that there was a  
13 discussion about not only the use of the property and whether  
14 it was a permitted use of the Southpark but it was for the  
15 operation of a gun store and a gun range. I think what is not  
16 contested is that this is a permitted used and that this is not  
17 a contested issue. Not only through argument of Counsel but  
18 also through what I will call the correspondences as well.

19           This letter from, arguably SPOA, Southpark, is not  
20 only persuasive to the Court but let me break it down as was  
21 done through cross-examination, because it comprises of three  
22 different sections. The first section, the first paragraph,  
23 describes what is the, quote, "permitted use," and it states,

24           "Southpark Owners Association has no objection to the  
25 proposed use of the building in question as a retail



1           gun sale shooting range. This use would fall within  
2           the permitted uses at Southpark."

3           That's a quote. The second paragraph actually  
4 discusses the potential need -- and I say potential need for  
5 architectural review committee and the process. And that is if  
6 something were altered or changed on the exterior. So this  
7 letter goes on to talk about if, for example, there was  
8 required exhausting of air including a new exterior HVAC  
9 system. That this quote "may trigger an ADCC review." The  
10 same with any alteration of a parking lot, landscaping,  
11 painting, et cetera.

12           When asked specifically of Mr. O'Dell what has  
13 actually changed, what is it that triggered this, there was  
14 nothing that he could point to or Counsel could point to or  
15 that the exhibits could point to that would say that this  
16 clause within this subsection of this letter is now triggered.  
17 In other words, is there a door, is there a wall, is -- is  
18 there an HVAC system that has now been added, modified, somehow  
19 not in compliance? Is the parking lot not being maintained, is  
20 it being torn up? Is there a wall that has been demolished?  
21 Is there new signage that is not in -- not in compliance? Is  
22 there something that has been done that has not been permitted?

23           In fact, the only testimony is that the parking lot,  
24 which is part and parcel of the request here that might trigger  
25 the architectural review, is that it's been maintained or

1 improved by Triple J. So that there has not been a physical  
2 event which has caused the petition for the injunctive relief  
3 except for the perceived noncompliance with the process. And  
4 yet the testimony of Mr. O'Dell is that the process was  
5 encompassed within Exhibit Number 2.

6 When Triple J received this, they continued to go  
7 forward with their process. The evidence at this point is that  
8 their construction is on the interior of this building as  
9 opposed to the exterior and that this expectation that was laid  
10 out by Mr. O'Dell has been fulfilled.

11 Now, before I may grant a motion for injunctive  
12 relief, I must find a variety of different things.  
13 Specifically, under Rule 65, I need to find that a -- that  
14 there's reasonable probability of success on the merits. As I  
15 said, this letter causes me great concern and I wish that this  
16 had been referenced much earlier because there is not one item  
17 that has been shown at this point to show that there has been  
18 noncompliance or that there is any type of variance to the  
19 expectations that were generated in this letter.

20 My specific question not only of Counsel but  
21 repeatedly has been what is the danger of real, immediate or  
22 irreparable harm which may be prevented by this injunctive  
23 relief? Well, there hasn't been any testimony or evidence of  
24 anything such as noxious fumes, asbestos exposure, noise,  
25 destruction of walls, of buildings, of any infrastructure other

1 than interior portions of this building as well.

2 Third, is there a plain, speedy, adequate remedy at  
3 law? Counsel said in his closing argument this may be more  
4 akin to a breach of contract claim as opposed to the request  
5 for injunctive relief. Counsel argues and I agree that there  
6 are other remedies such as declaratory judgment actions and/or  
7 criminal or civil citations for noise violations or building  
8 code violations which are not necessarily before this Court  
9 because those are remedies which exist independent of this  
10 action.

11 In granting of this preliminary injunction, I have to  
12 decide whether or not it will disserve this public interest.  
13 Well, obviously, there's a competing public interest for the  
14 community as a whole. On the one hand, you have a business  
15 which is attempting to make money and to thrive and we don't  
16 know whether there are violations which are occurring on the  
17 interior of the building. But that evidence has not been  
18 brought before me and, of course, that was not an issue that  
19 was raised in Mr. O'Dell's letter, Exhibit A. Yet, we also  
20 have concerns of the Plaintiffs themselves as to whether or not  
21 their public interest is in fact affected.

22 Now, let me tell you what this case is about and what  
23 it's not about because this case is whether an injunction  
24 should be issued in this case because of irreparable harm. The  
25 question before this Court is not whether this is a safe

1 building. There's no evidence that it's unsafe. Whether the  
2 activities inside are safe or unsafe. Whether this is an  
3 appropriate use within the community or whether this type of  
4 business is appropriate given its proximity to other citizens  
5 and/or businesses within the community. That's not the  
6 question before me.

7           The question before me is whether or not a temporary  
8 restraining order should in fact be granted. Obviously, when I  
9 look at the equities, there are equities on both sides. There  
10 is the delay in construction. There is the -- the loss of  
11 money and/or funds for business development and business  
12 opportunity and there are equities that Plaintiff's Counsel  
13 makes reference to in terms of we don't know what is happening  
14 on the inside and we may not want this type of business within  
15 our community.

16           However, it seems as if we're trying to roll back the  
17 clock based on a letter that was dated October 26, 2017. Will  
18 the status quo be preserved if I grant this? Well, yes, it  
19 will be preserved for SPOA but it won't be for Triple J. They  
20 are the ones who are suffering.

21           I am not going to grant this -- this motion and the  
22 request for a temporary restraining order is denied.

23           Is there anything else that is left before this Court  
24 at this point for Plaintiff?

25           MR. MINNIG: The Court has simply denied the -- the

1 request for a temporary restraining order. Can we move forward  
2 and -- and set things at this time for a permanent injunction?

3 THE COURT: For a permanent injunction?

4 MR. MINNIG: Or for other -- for other -- for a trial  
5 on the merits.

6 THE COURT: What is the complaint for the trial on  
7 the merits? In other words --

8 MR. MINNIG: I think you're right, Your Honor. We'll  
9 have to re-file and we're going to have to respond to the  
10 complaint that's been filed against us.

11 THE COURT: Well, again, there's no complaint filed  
12 in this case that I'm aware of that has been accepted that is a  
13 counterclaim. Maybe it's been filed under something else. But  
14 again, that's -- that's information that you folks are bringing  
15 externally to the information I have.

16 For the Defense, is there anything else that we do at  
17 this point?

18 MR. DEIHL: Your Honor -- Your Honor, our only  
19 request would that you grant our attorney's fees associated  
20 with this motion under the declaration we're entitled to that.  
21 And we're also entitled to it under the law. We can submit an  
22 attorney's fee request later to determine the reasonableness.

23 THE COURT: Okay. So let me make sure that I  
24 understand. When you say for the attorney's fees associated  
25 with the declaration?

1           MR. DEIHL: I'm sorry, with this motion. With the  
2 motion for preliminary injunction.

3           THE COURT: Under what -

4           MR. DEIHL: I -- I misspoke.

5           THE COURT: Under -- that's what I'm trying to get  
6 it. Under what legal authority is it that you're asking for it  
7 attorney's fees?

8           MR. DEIHL: The declaration itself. I'm going to  
9 have to find it, Your Honor. One moment.

10          THE COURT: Because I don't know if there's a  
11 contested issue regarding this in terms of whether or not --  
12 just in -- just bear with me. Not the issue of attorney's  
13 fees, but whether there is an attorney's fees provision that  
14 would be applicable to the preventing party in a matter such as  
15 this. Because that may be part -- part and parcel of a  
16 separate pleading.

17          So I don't want -- I don't want to push the parties  
18 into that until there's an agreement as to whether there is a  
19 contractual provision that applies to this circumstance. If  
20 there is, then I could address that. If there isn't, then I'm  
21 going to ask that you brief it.

22          MR. DEIHL: Your Honor, I -- I think maybe the better  
23 way to proceed would be for us to make a motion based on the --  
24 the evidence -- the declaration. And we can talk to Opposing  
25 Counsel about that before we do it and see if we can reach an

1 agreement on it.

2 THE COURT: Okay. So let me just be very specific --

3 MR. DEIHL: Sure.

4 THE COURT: -- because you don't see the other cases  
5 that I have.

6 MR. DEIHL: Okay.

7 THE COURT: And so that when -- when I have a  
8 situation like this, what I always ask Counsel to do is if  
9 there is an agreement regarding what the declaration states,  
10 state so. If there isn't an agreement, then we have to have an  
11 evidentiary hearing so that I can find as a prerequisite there  
12 is an agreement which can or should be interpreted in the --  
13 the following manner. In other words, reach the stipulation.  
14 I assume this is a no brainer. I assume that the parties can  
15 say yes or no, this is the clause that we're dealing with and  
16 if so, put that in your motion, then I can rule as a matter of  
17 law. If not, then I still need facts.

18 MR. DEIHL: Understood, Your Honor.

19 THE COURT: Now, Plaintiff's Counsel, you were going  
20 to address one more thing?

21 MR. MINNIG: Yes, Your Honor. Just for -- just so I  
22 understand. We -- we -- we received and it's stamped and it's  
23 filed, verified answer counterclaim and third party complaint  
24 in this matter.

25 THE COURT: When was that filed?

1 MR. DEIHL: Your Honor, that was filed Wednesday  
2 evening about the same time as the response to the motion for a  
3 preliminary injunction.

4 THE COURT: I don't have anything.

5 MR. MINNIG: Okay. Because I was going to say, Your  
6 Honor, as long as we've got a complaint here and we're going to  
7 have to -- we're going to continue to proceed with litigation  
8 and seek to get these -- these issues resolved in a manner  
9 other than simple injunction and we may be resolving issues or  
10 not resolving issues or trying issues, but since there is a  
11 complaint that I -- we -- we simply put these issues -- the  
12 issue of attorney's fees off pending that.

13 THE COURT: Well, let's -- let -- no. Let me -- let  
14 me be very specific and address one thing at a time. The  
15 complaint that I have in the file that has been accepted by the  
16 Court is for injunctive relief and breach of the restrictive  
17 covenants which I've now ruled on. Is there a separate  
18 counterclaim in another lawsuit or in this lawsuit?

19 MR. DEIHL: In this lawsuit, Your Honor. Triple J  
20 filed its answer, counterclaims, and a third party claim on  
21 Wednesday, sort of late afternoon, early evening.

22 THE COURT: Okay. Hold on. I apologize. I -- I see  
23 it here because --

24 MR. MINNIG: Right. It was 7:37 p.m. on September  
25 19th.



1 THE COURT: All right. So then we have not yet  
2 received an answer to the counterclaim?

3 MR. DEIHL: Correct.

4 THE COURT: So it's not yet at issue yet.

5 MR. MINNIG: That's correct, Your Honor.

6 THE COURT: All right.

7 MR. MINNIG: These issues are all going to  
8 (indiscernible) and there's going to be issues concerning the  
9 attorney's fees throughout this thing and et cetera.

10 THE COURT: Oh, well, that's the second part of it.  
11 And here's what I don't do. So -- just so that you're clear.  
12 And I'll give you an example. I will do litigation and it may  
13 last for a year. It may last for six months. Lawyers at the  
14 conclusion of the litigation say I want attorney's fees and  
15 then they go through the parade of horrors and misconduct at  
16 infinitum. I can't do that and I won't do that because I won't  
17 re-create history that way.

18 If there's an issue of attorney's fees, it has to be  
19 raised contemporaneously. We'll have a hearing and resolve it.  
20 So that motion should be filed in seven days, seven days for a  
21 response, no further replies. We'll resolve it, move on. I'm  
22 not recreating history because if I were to do it your way and  
23 you were the prevailing party, I'm going to deny it. It's not  
24 a good use of my time, your time, and I can't recreate history  
25 and I would do nothing else but go through the procedural

1 history of a case rather than dealing with the issues before  
2 me.

3 Let me tender to Counsel the documents that you can  
4 upload to JPOD or Eclipse for appellate purposes as you deem  
5 fit because we don't store these exhibits. And thank you. I  
6 will await these motions within the next 14 days.

7 MR. MINNIG: Thank you, Your Honor.

8 THE COURT: Have a good day.

9 (Proceeding concluded at 11:16 a.m.)  
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**CERTIFICATE**

I, Tina Swenson, certify that I transcribed this record from the digital recording of the above-entitled matter, which was heard on September 21, 2018, before THE HONORABLE FREDERICK MARTINEZ, in Division 15 of the Arapahoe County District Court.

I further certify that the aforementioned transcript is a complete and accurate transcript of the proceedings based upon the audio facilities of these CDs and my ability to understand them. Indiscernibles are due to microphones not working properly, excessive noises or muffled voices.

Signed this 8th day of October, 2018, in Longmont, Colorado.



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