DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: 1437 Bannock St., Room 256
Denver, CO 80202

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CASE NUMBER: 2015CV32427

Plaintiffs: ARTHUR KEITH WHITELAW, III, JOHN DERUNGS, KATHERINE K. MCCRIMMON, LAURA PITMON, DENISE SIGON f/k/a DENISE L. SAGER, and ALAN and RITA SINGER.

Defendants: THE DENVER CITY COUNCIL (including the individual Council members in their official capacity, Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul López, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman;
THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity);
THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittney Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz, and Chris Smith);
THE CITY AND COUNTY OF DENVER; and
CEDAR METROPOLITAN LLC (the Property Owner/zoning Applicant).

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Case Number: 2015cv032427

Ctrm: 269

Attorney for Plaintiffs
Gregory J. Kerwin
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
Telephone: 303.298.5700
E-mail: GKerwin@gibsondunn.com

PLAINTIFFS' MOTION UNDER C.R.C.P. 106(A)(4)(V) AND 65 FOR STAY OF ACTIONS BY CITY OF DENVER TO ALLOW ANY NEW CONSTRUCTION ON MT. GILEAD PARCEL PENDING THIS COURT'S RULING ON THE MERITS OF PLAINTIFFS' CLAIMS IN THEIR COMPLAINT

To preserve the status quo while this Court is addressing the merits of Plaintiffs' claims, Plaintiffs move under C.R.C.P. 106(a)(4)(V) and 65 that the Court enter an order staying any actions by the City and County of Denver to allow new construction on the Mt. Gilead Parcel pending this Court's ruling on the merits of Plaintiffs' claims in their Complaint. Specifically, Plaintiffs request an order that:

> During the time period this Court is considering the City Defendants' motion to dismiss filed July 28, 2015, and provided the Court denies in whole or in part the City's motion to dismiss, then continuing until 49 days after the Court enters a final order ruling on the merits of all Plaintiffs' claims in their Complaint (which seek relief under C.R.C.P. 106(a)(4) and for declaratory judgment), and unless further extended by agreement of the parties or an order of this Court or the Colorado Court of Appeals:
>
> a. The Development Services office in the Denver Department of Community Planning and Development ("CPD") will not: (i) approve or record any Site Development Plan for the Mt. Gilead Parcel, or (ii) approve or issue any building permit allowing any new construction at the Mt. Gilead Parcel.
>
> b. Upon entry of an Order approving such a stay, Plaintiffs will post an injunction bond under C.R.C.P. 65(c) of $100 (one hundred dollars) in cash by depositing that amount with the Clerk of the Court to be held in a non-interest bearing account in the registry of Court. Plaintiffs request that the Court require this $100 bond, rather than no bond, because under Colorado law the general rule is that an enjoined party may not recover damages in excess of the bond amount. *See, e.g., Atmel Corp. v. Vitesse Semiconductor Corp.*, 160 P.3d 347, 349 (Colo. App. 2007).

In recognition of the Court's entry of this stay, Plaintiffs agree to brief the merits of their claims in this case as quickly as possible to allow the Court to rule soon on the merits. Subject to rulings from the Court on Plaintiffs' anticipated request to obtain discovery concerning alleged *ex parte* contacts with Denver City Council members concerning the proposed zoning change for the Mt. Gilead Parcel, Plaintiffs agree to adhere to the briefing schedule in C.R.C.P. 106(a)(4)(VII) for both Plaintiffs' claims under Rule 106(a)(4) and for declaratory judgments.

As explained below, Plaintiffs believe they meet the requirements under C.R.C.P. 65 for such a stay.

Certification of conference with opposing counsel: In accord with C.R.C.P. 121, Section 1-15(8), Plaintiffs' counsel (Gregory Kerwin) conferred with counsel for the City Defendants (Nathan Lucero and Tracy Davis of the Denver City Attorney's office) on September 2, 2015 before filing this motion. That discussion was preceded by Plaintiffs' counsel providing a proposed stipulation for a stay to counsel for the City Defendants for their review and comment.

From that discussion, Plaintiffs understand that the City Defendants are not ready at this time to take a position on this motion and have requested that Plaintiffs first move for a default judgment against Defendant Cedar Metropolitan LLC. (Plaintiffs did file that motion for default judgment on September 8, 2015.)

Plaintiffs believe from personal observation of the Mt. Gilead Parcel, that a project is currently underway to remove asbestos from the Mt. Gilead Church and then demolish that church building. Counsel for the City Defendants informed Plaintiffs on September 2, 2015, that as of that date the owner of the Mt. Gilead Parcel had not initiated discussions with the City (including CPD) about a proposed Site Development Plan for the Mt. Gilead Parcel, or applied for a building permit to allowing any new construction at the Mt. Gilead Parcel.

Defendant Cedar Metropolitan LLC forfeited its right to participate in this action by failing to file a timely response to Plaintiffs' Complaint. Its response was due more than six weeks ago, on July 27, 2015. *See* Plaintiffs' Motion for entry of interim default judgment (filed September 8, 2015).

In support of this motion, Plaintiffs state as follows:

Background concerning this lawsuit and Plaintiffs' stay request

1. As Plaintiffs explain in detail in their Complaint, they are challenging the rezoning of a 2.3 acre parcel on the east side of Crestmoor Park from a single-family home zoning category to S-MU-3, which will allow high-density three story apartment buildings on this site. Plaintiffs contend the rezoning was unlawful. *See* Complaint ¶ 2 (summarizing grounds for challenge).

2. Plaintiffs seek review in this Court under C.R.C.P. 106(a)(4) of the Denver City Council and Denver Planning Board's decisions approving this rezoning, and also assert claims for declaratory judgment.

3. This Court already entered an order on July 29, 2015 granting Plaintiffs' motion under C.R.C.P. 106(a)(4)(III) requiring certification of the administrative record within 28 days after Defendants file an answer. The City Defendants have delayed this Court's resolution of the merits of Plaintiffs' claims by filing a motion to dismiss, which Defendants contend is groundless and should be denied.

4. Subject to obtaining evidence for the administrative record documenting the timing and substance of the *ex parte* contacts that occurred with Denver City Council members about the 195 S. Monaco Zoning Change, *see* Complaint ¶¶ 2.a, 36, 67, Plaintiffs have no objection to having the Court set an expedited briefing schedule if the Court believe such expedited briefing is desirable as part of the Court entering the stay Plaintiffs request here.

Plaintiffs meet the requirements for a stay under Rule 65 and the "Rathke" factors.

5. C.R.C.P. 106(a)(4)(V) provides: "The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure." It is appropriate for a plaintiff in a Rule 106(a)(4) case for the plaintiff to seek a stay at the outset of the action in order to preserve his or her rights during the court's review of the administrative action. *See Zoning Board of Adjustment v. DeVilbiss*, 729 P.3d 353, 359 (Colo. 1986).

6. Colorado courts analyze the six "*Rathke*" factors in deciding whether to grant a preliminary injunction under C.R.C.P. 65 (and thus C.R.C.P. 106(a)(4)(V)). The moving party must demonstrate:

(1) it has a reasonable probability of success on the merits;

(2) a danger of real, immediate, and irreparable injury exists which may be prevented by injunctive relief;

(3) there is no plain, speedy, and adequate remedy at law;

(4) there is no disservice to the public interest;

(5) the balance of equities favors the injunction; and

(6) the injunction preserves the status quo pending a trial on the merits.

See, e.g., Westpac Aspen Investments, LLC v. Residences at Little Nell Development, LLC, 284 P.3d 131, 138 (Colo. App. 2011) (citing *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982)). A trial court judge has considerable discretion in deciding whether to grant a preliminary injunction under Colo. R. Civ. P. 65(a). *See id.; see also SCA Serv., Inc. v. Gerlach*, 543 P.2d 538, 539 (Colo. Ct. App. 1975).

7. Here, each of these six factors favors granting Plaintiffs the stay they seek in this motion.

Factor 1: Reasonable Probability of Success on the Merits

8. Plaintiffs' Complaint presents in detail the substance of Plaintiffs' arguments here, and demonstrates their claims challenging the 195 S. Monaco Zoning Change (as defined in Para. 2 of the Complaint) is well-founded. Plaintiffs' brief opposing the City Defendants' motion to dismiss demonstrates the City's challenge the validity of Plaintiffs' claims is groundless.

9. The facts and circumstances that Plaintiffs allege in detail in their Complaint concerning how the 195 S. Monaco Zoning Change occurred, if proven, would establish a proper basis for the Court to set aside that change under Rule 106(a)(4). Thus, Plaintiffs have demonstrated in their Complaint that they have a reasonable probability of success on the merits.

Factor 2: <u>Danger of Irreparable Harm</u>

10. If the Defendants move forward and allow new construction on the Mt. Gilead Parcel, that will cause irreparable harm to Plaintiffs and the hundreds of other nearby residents whose existing homes surround Crestmoor Park. Plaintiffs face the harms detailed in Paragraph 7 of the Complaint, including traffic and parking problems on the streets surrounding the Mt. Gilead Parcel, harm to their enjoyment and use of Crestmoor Park, harm to their property values, harm from loss of the protections of the Denver Zoning Code for property owners whose property is located within a City-designated "Area of Stability," and specifically harm to the townhome owners whose townhomes abut the Mt. Gilead Parcel (including Plaintiff Denise Sigon), and to the Crestmoor Learning Center pre-school facility owned by Plaintiff Laura Pitmon, which is located across Cedar Avenue from the Mt. Gilead Parcel. These harms are irreparable because once a new high-density apartment building is constructed on the Mt. Gilead Parcel, that new building and its new residents will continue to cause harm to the surrounding neighborhoods for the life of that building.

11. As recognized in *Wells v. Lodge Properties, Inc.*, 976 P.2d 321, 324 (Colo. App. 1998): "A property owner has a legally protected interest in protecting its property from adverse effects by legally deficient zoning of adjacent property, and has standing to challenge such rezoning." The Denver Zoning Code is supposed to protect the rights of property owners against unlawful rezoning and "spot zoning" like what occurred here.

Factor 3: <u>Adequate Legal Remedy</u>

12. Plaintiffs are entitled to a stay because they do not have an adequate remedy at law. Real property is unique and money damages are generally inadequate to remedy harm to a real property interest. *See, e.g., Benson v. Nelson*, 725 P.2d 71, 72 (Colo. Ct. App. 1986); *Prosser v. Smith*, 197 P.2d 318 (Colo. 1948). The real property interests that are harmed here are the property values and quality of life for Plaintiffs and the hundreds of residents whose homes surround Crestmoor Park.

13. Plaintiffs contend that the 195 S. Monaco Zoning Change, and resulting high-density development on the Mt. Gilead Parcel will degrade the value, livability, and quality of life in their neighborhood and city park surrounding that parcel. Money damages will not suffice to compensate Plaintiffs and the hundreds of other surrounding residents for the tangible and intangible damage Defendants' new high-density development will cause.

Factor 4: <u>Preserve the Status Quo</u>

14. Granting the stay will preserve the status quo with the Mt. Gilead Parcel until this Court can decide the merits of Plaintiffs' claims, including whether the 195 S. Monaco Zoning Change was unlawful.

Factor 5: <u>The Public Interest</u>

15. The public interest will be served by granting the stay. The public has a strong interest in having city boards, departments, public servants, and the City Council make decisions with integrity using lawful quasi-judicial procedures that consider appropriate factors and evidence during a rezoning process, without conflicts of interest. The parties can brief the issues quickly and allow the Court to decide within a few months whether Plaintiffs' Rule 106 claim and declaratory judgment claim are well-founded.

16. The City of Denver should be concerned with ensuring the integrity of its rezoning decisions. As detailed in Plaintiffs' Complaint, the process used for the 195 S. Monaco Zoning Change had major deficiencies, failed to follow the requirements for quasi-judicial decisionmaking and the criteria for zoning changes in the Denver Zoning Code, and was tainted by conflicts of interest and *ex parte* contacts.

Factor 6: <u>Balance of Equities</u>

17. Finally, the balance of equities favors granting a stay. Plaintiffs seek to have a neutral party (the Court) review the 195 S. Monaco Zoning Change to determine whether it was proper. Plaintiffs' Complaint explains in detail why that rezoning was unlawful even under the deferential standard of review that applies in a Rule 106 case. Assuming the Court does not grant the City Defendants' motion to dismiss, then Plaintiffs have stated valid claims. Plaintiffs seek the stay only for the time it takes the Court to rule on the merits of their claims and are willing to participate in an expedited briefing process so the Court can decide the issue within a few months.

18. In evaluating the potential harm from a preliminary injunction under C.R.C.P. 65(c), the court only looks to the harm that would occur during the short time the stay would be in effect through the Court's ruling on the merits. *See Zoning Board of Adjustment v. DeVilbiss*, 729 P.3d 353, 358 (Colo. 1986) (court looks "to the probable costs and damages attributable to the cessation of activity during this preliminary phase of the case") (discussed below in Para. 22).

19. Here, the owner of the Mt. Gilead Parcel, Cedar Metropolitan LLC, has elected not to timely respond to Plaintiffs' Complaint in this case, and is now in default. Therefore, it has forfeited the right to participate as a party in this lawsuit. *See* Plaintiffs' Motion for interim default judgment (filed September 8, 2015).

20. In addition, in weighing the equities in this case:

a. The City Defendants have already caused nearly two months' delay from when this lawsuit was filed through the filing of, and briefing on, their motion to dismiss. Plaintiffs are not to blame for that delay. The merits briefing on Plaintiffs' claims could be far along in this case if the City had not filed that motion to dismiss.

b. Plaintiffs are not trying to challenge here the demolition of the existing Mt. Gilead Church building, which is currently underway at the Mt. Gilead Parcel. They are only challenging the building of a new building. Therefore, the building owner can proceed, despite the requested stay, with its asbestos removal and building demolition. The current market value of the Mt. Gilead Parcel will not be diminished by that demolition—indeed it may be enhanced when there is only an empty lot. In addition, the Court can take judicial notice that property values in Denver are increasing rapidly at this time, so during the few months the requested stay is in effect, Denver property values, including the market value of the Mt. Gilead Parcel, are likely to stay even or increase.

c. The City Defendants do not have a valid interest in rushing to get a new high-density building constructed on the Mt. Gilead Parcel. The City's interest should be the same as the public interest: ensuring that rezoning procedures are correctly followed and avoiding unlawful harm to Denver property owners including Plaintiffs.

d. Plaintiffs are willing to minimize the burden caused by a stay by quickly briefing the merits of this dispute.

21. Therefore, the balance of the equities weighs in favor of the stay Plaintiffs request.

The Court should require an injunction bond of $100 under C.R.C.P. 65(c)

22. The Court should require a preliminary injunction bond of $100 (one hundred dollars) from Plaintiffs under C.R.C.P. 65(c). That rule provides, in part:

> **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . . If at any time it shall appear to the court that security given under this Rule has become impaired or is insufficient, the court may vacate the restraining order or preliminary injunction unless within such time as the court may fix the security be made sufficient.

The trial court has discretion in setting a preliminary injunction bond under C.R.C.P. 65(c) "as long as it [the bond] bears a reasonable relationship to the potential costs and losses caused by a preliminary injunction which is later determined to have been improperly granted." *Zoning Board of Adjustment v. DeVilbiss*, 729 P.3d 353, 358 (Colo. 1986). Because the grant of a preliminary injunction is immediately appealable, "the security requirement of C.R.C.P. 65(c) can be limited to the probable costs and damages attributable to the cessation of activity during this preliminary phase of the case." *Id.*

23. Defendants cannot articulate a proper basis for seeking damages from Plaintiffs from the short delay occasioned by the stay Plaintiffs seek here. The City Defendants would not

suffer any damages, and Defendant Cedar Metropolitan LLC has forfeited its right to participate as a party in this case through its default.

24. Allowing the Court to rule on the merits of Plaintiffs' claims is in the public interest (and therefore should be in the City of Denver's interest). Plaintiffs' claims here can be briefed and decided in an expedited manner. Therefore, setting a bond amount of $100 as a condition for this stay is consistent with the lack of cognizable damages to the Defendants.

25. Plaintiffs request that the Court require a bond of $100, rather than no bond, because under Colorado law the general rule is that a wrongfully enjoined party may not recover damages in excess of the bond amount. *See, e.g., Atmel Corp. v. Vitesse Semiconductor Corp.*, 160 P.3d 347, 349 (Colo. App. 2007).

26. If the Court holds a hearing on this Motion, Plaintiffs request that hearing be scheduled as quickly as possible. Because the Rule 106(a)(4) process contemplates court review of an administrative record, rather than the introduction of new evidence, Plaintiffs are not providing affidavits in support of this Motion. Nevertheless, Plaintiffs can present live testimony in support of their claims and this Motion at an evidentiary hearing if the Court believes such additional evidence would be helpful.

WHEREFORE, Plaintiffs respectfully request that this Court grant this Motion, grant a stay under C.R.C.P. 106(a)(4)(V) and 65, and order that:

1. During the time period this Court is considering the City Defendants' motion to dismiss filed July 28, 2015, and provided the Court denies in whole or in part the City's motion to dismiss, then continuing until 49 days after the Court enters a final order ruling on the merits of all Plaintiffs' claims in their Complaint (which seek relief under C.R.C.P. 106(a)(4) and for declaratory judgment), and unless further extended by agreement of the parties or an order of this Court or the Colorado Court of Appeals:

    a. The Development Services office in the Denver Department of Community Planning and Development ("CPD") will not: (i) approve or record any Site Development Plan for the Mt. Gilead Parcel, or (ii) approve or issue any building permit allowing any new construction at the Mt. Gilead Parcel.

    b. Upon entry of an Order approving such a stay, Plaintiffs will post an injunction bond under C.R.C.P. 65(c) of $100 (one hundred dollars) in cash by depositing that amount with the Clerk of the Court to be held in a non-interest bearing account in the registry of Court.

2. grant such other and further relief as the Court deems just and proper.

A proposed order is attached to this Motion.

Dated: September 9, 2015

/s/ Gregory J. Kerwin
Gregory J. Kerwin, No. 14161
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4200
Denver, CO 80202-2642
(303) 298-5700
Email: GKerwin@gibsondunn.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2015, I caused a copy of the foregoing PLAINTIFFS' MOTION UNDER C.R.C.P. 106(A)(4)(V) AND 65 FOR STAY OF ACTIONS BY CITY OF DENVER TO ALLOW ANY NEW CONSTRUCTION ON MT. GILEAD PARCEL PENDING THIS COURT'S RULING ON THE MERITS OF PLAINTIFFS' CLAIMS IN THEIR COMPLAINT to be served upon all counsel through the ICCES system or by first-class mail (as indicated below):

Nathan Lucero
Tracy Davis
Assistant City Attorneys
Denver City Attorney's Office
Municipal Operations Section
201 W. Colfax Ave., Dept. 1207
Denver, CO 80202

(counsel for City Defendants)
(served via ICCES)

Cedar Metropolitan LLC
c/o A. Peter Kudla, Registered Agent
10111 Inverness Main Street, Suite T
Englewood, CO 80112

(served via first-class mail)

s/ Loretta Howard
Loretta Howard

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